EXHIBIT B

EXHIBIT B:

Trial Brief by Mr. Toothacre

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UNITED STATES TAX COURT

RODNEY M. TOOTHACRE, Petitioner, COMMISSIONER OF INTERNAL REVENUE Respondent.	)	Docket No. 26357-06"L"

PETITIONER RODNEY M. TOOTHACRE'S TRIAL BRIEF

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PETITIONER RODNEY M. TOOTHACRE'S TRIAL BRIEF

I. INTRODUCTION

This case arises out of a tax dispute between Petitioner RODNEY M. TOOTHACRE and the INTERNAL REVENUE SERVICE (IRS). The IRS has filed various liens against Petitioner's property wrongfully and maliciously resulting in both financial damages and emotional damages as described more fully herein.

II. STATEMENT OF FACTS

In **December of 2005**, Petitioner had a refinance escrow open in order to become compliant with all undisputed taxes and to do necessary repairs to his residence.

On **December 12, 2005,** Attorney Joseph S. Carmellino wrote a letter to Revenue Officer Martinez, advising her that he had been retained by the Petitioner to take legal action as necessary to clear the various liens that the IRS was claiming, and to seek compensation for the damages that these wrongful filings had caused his client. A copy of that letter is marked Exhibit "A" to Exhibit #17 of the Stipulation of Facts, and made a part hereof as though set forth here in full. That letter advised that the Notice of Federal Tax Lien for Rodney M. & Marcia L. Toothacre's 1040s for 1993 and 1994 had first been recorded with the San Diego County Recorder's Office on February 4, 1997. It further advised that those Notices of Federal Tax Liens **acted as Certificates of Release of Liens and therefore the liens were released on June 1, 2005 for tax year 1993 and July 6, 2005 for tax year 1994.** That letter demonstrates that Revenue Officer Martinez intentionally and purposefully interfered with a pending refinance escrow by delivering to the escrow holder Notices of Federal Taxes Due in the total amount of $488,367.37, knowing full well at the time of delivery to escrow by Revenue Officer Martinez that some, if not most, of the taxes alleged to be due were uncollectible because the CSEDs (Collection Statute Ending Dates) had run. One of the Notices of Federal Taxes Due claimed taxes for the year 1992 which had clearly self released and had also been released by Certificate of Release. Revenue Officer Martinez took this action wilfully intentionally and with malice. Mr. Carmellino's December 12th letter stated that Petitioner was willing to pay out of the escrow, taxes for 1995, 1996, 2003, 2004, and 2005.

3 In addition to the fact that the liens for 1993 and 1994 1040 taxes due expired by their own terms, there were also **Certificates of Release of Federal Tax Liens issued the IRS on August 8, 2005, and recorded with the San Diego County Recorder.** In spite of this knowledge, Revenue Officer Martinez, maliciously, fraudulently and falsely told the escrow officer that the Certificates of Release of Federal Tax Liens were filed in error even though IRC § 63215(f) provides in part:

> Except as provided in paragraphs (2) and (3), if a certificate is issued pursuant to this section by the Secretary and is filed in the same office as the notice of lien to which it relates (if such notice of lien has been filed) such certificate shall have the following effect:
>
> (A) in the case of a certificate of release, such certificate shall be ***conclusive*** that the lien referred to in such certificate is extinguished; (emphasis added)

Attorney Carmellino's December 12th letter to Revenue Officer Martinez demanded that she take the necessary steps to remove the 1993 and 1994 tax liens, reiterating that it was crucial that his client's refinance escrow close immediately.

4 On **December 13, 2005,** Attorney Carmellino wrote a follow up letter to Revenue Officer Martinez advising her that he had been furnished a document entitled,"**490 Activity Summary - [redacted] TOOT,**" which reflected that payments were being levied out of petitioner's Social Security benefits and were being applied to 1040 Tax Period 1993/12 which was uncollectible because the CSEDs had run. Attorney Carmellino again stated that the CSED had run on that year and that the benefits being levied were illegal, unconscionable, and at the very least, that said levy be applied to a collectible tax year. That document also establishes that the taxes for 1040 tax period 1993 were assessed on **April 4, 1994.** Revenue Officer Martinez, as well as Settlement Officer Chadwell, which will be discussed below, deny that this 490 Activity Summary document is an IRS document, even though it was obtained from the Internal Revenue Service. A copy of Attorney Carmellino's **December 13, 2005** letter is marked Exhibit **"B"**to Exhibit #17 of the Stipulation of Facts and made a part hereof as though set forth here in full.

5 On **December 20, 2005,** Attorney Carmellino wrote Revenue Officer Martinez a letter

proposing a compromise so that Petitioner's refinance escrow could close with no further damage being caused to Petitioner by the IRS. That letter stated:

> The purpose of this letter is to propose a compromise so that the Toothacre refinance escrow can close with no further damages being caused by the Internal Revenue Service.
>
> We will agree that the escrow holder may pay to the Internal Revenue Services the taxes, interest and penalties which are due and payable in connection with the tax years specified in my letter dated December 12, 2005. I have not had the courtesy of a reply to that letter yet. Nor have you seen fit to return my telephone calls. To refresh your recollection our offer was:

Kind of Tax.	Tax Year	Assessment Date	Amount at
1040	1995	November 24, 1997	$ 27,533.65
1040	1996	November 24, 1997	$ 12,684.56
1040	2003	November 8, 2004	$ 17,651.12
1040	2004	May 30, 2005	$ 16,476.45
941	1996	December 9, 1996	$ 14.00

> Additionally we would agree that the sum of $100,000.00 could be held in an independent trust account pending resolution of this dispute.

Attorney Carmellino also advised Revenue Officer Martinez of Petitioner's intention to appeal the filing of **the liens for 1993 and 1994**. A copy of Attorney Carmellino's **December 20, 2005,** letter is marked Exhibit **"C"** to Exhibit # 17 of the Stipulation of Facts and made a part hereof as though set forth here in full.

On **December 22, 2005,** Petitioner prepared and filed a Request for a Collection Due Process Hearing. That Request was sent by Certified Mail, Return Receipt Requested, to the Internal Revenue Service on **December 22, 2005,** and the return receipt was dated and signed on **December 23, 2005.** A true and correct copy of that receipt is marked Exhibit **"D"** to Exhibit # 17 of the Stipulation of Facts and made a part hereof as though set forth here in full.

The Request for the Collection Due Process Hearing attached supporting exhibits and a legal brief setting forth the taxpayer's contentions:

1. THE SUBJECT TAXES WERE DISCHARGED BY BANKRUPTCY
2. THE NOTICE OF FEDERAL TAX LIEN EXPIRED BY ITS OWN TERMS
3. THE INTERNAL REVENUE SERVICE RELEASED THE LIENS
4. THE IRS' ATTEMPT TO REFILE LIENS FAILS
5. THE STATUTE OF LIMITATIONS HAS RUN
6. THE INTERNAL REVENUE SERVICE HAS ACTED WITH MALICE

A true and correct copy of the Request for a Collection Due Process Hearing is marked Exhibit "E" to Exhibit #17 of the Stipulation of Facts, along with all of the exhibits, marked 1 through 6, and are made a part hereof as though set forth here in full.

(9) On **January 3, 2006,** Attorney Carmellino wrote to Revenue Officer Martinez, acknowledging a phone message left by her on his phone on **December 22, 2005,** advising Attorney Carmellino that she would return to her office on **January 3, 2006,** after her Christmas break. He commented that in that phone message she had said that Mr. Toothacre's offer to pay taxes did not cover all of the taxes due. Attorney Carmellino informed Ms. Martinez that the offer was an offer to pay, **in full** all, taxes, interest and penalties which were collectible by the IRS.

(10) In that conversation, Attorney Carmellino renewed the offer with the qualification that the offer no longer contemplated the withholding of $100,000.00 pending resolution of any dispute. That letter also advised Revenue Officer Martinez that if Mr. Toothacre's escrow did not close, that it was Petitioner's intention to avail himself of the remedies provided by IRC § 7433. Attorney Carmellino also advised Revenue Officer Martinez that his client had "now received from the IRS a Final Notice Before Levy on Social Security Benefits." A copy of Attorney Carmellino's letter of January 3, 2006, is marked as Exhibit "F" to Exhibit 17 of the Stipulation of Facts and made a part hereof as though set forth here in full.

(11) The Notice of Levy stated that it was an attempt to collect 1040 taxes for tax year 2004. Attorney Carmellino informed Revenue Officer Martinez that Mr. Toothacre acknowledged those taxes were due and owing. Attorney Carmellino reminded Revenue Officer Martinez that the IRS had already levied on Mr. Toothacre's Social Security Benefits and wrongfully applied them to tax year 1993. Attorney Carmellino demanded that the IRS reverse those collections and apply them to tax year 2004. Attorney Carmellino's letter to Ms. Martinez also pointed out that the efforts by the

IRS to renew the lien for the 1993 taxes had not followed the procedures set forth in the Internal Revenue Code, citing Section 6325 (f) (2), 6325 (f) (2) (A) and 6325 (f) (2) (B). A true and correct copy of Attorney Carmellino's letter dated **January 3, 2006,** is marked Exhibit "F" to Exhibit #17 of the Stipulation of Facts and made a part hereof as though set forth herein in full.

12 On **January 18, 2006,** Attorney Carmellino wrote a letter to Revenue Officer Martinez requesting that his letter be appended to his client's appeal, previously filed through her office. That letter, among other things, stated:

> **Once again demand is made that the internal revenue service release the purported notice of federal tax liens for the years 1040 93, and 1040 94 filed on December 2, 2005. This is an opportunity for the Government to mitigate the damages being incurred by Mr. Toothacre.** (emphasis added)

That letter discussed at length the Internal Revenue Manual concerning the CQMS (Collection Quality Measurements) providing that the taxpayer is entitled to fair and courteous treatment.

(13) Also, in that letter, Attorney Carmellino reminded Revenue Officer Martinez that she had told to him that the filing of a bankruptcy caused six months to be tacked on at the end of the 10-year statute of limitation period. Thus, it was Revenue Officer Martinez' position that the CSED had not run. Attorney Carmellino cited Revenue Officer Martinez to *Young v. United States,* 122 S.Ct. 1036, wherein the United States Supreme Court held that it was impermissible to tack on the additional six (6) months.

(14) Revenue Officer Martinez knew this was false as she was aware of the issuance of Notice CC-2002-023 by the Office of Chief Counsel of the Internal Revenue Service notified all personnel. Attorney Carmellino advised her that *"it is now settled law that a bankruptcy may toll the collection statute of limitations for the full period of the bankruptcy, but for no additional period."* Notice CC-2002-023 by the Office of Chief Counsel of the Internal Revenue Service states in part:

May 9, 2002

Tolling of Priority and Dischargeability Periods in Bankruptcy after Upon Incorporation Subject: Young v. United States Cancellation Date: into CCDM

Purpose

This notice clarifies that, in light of the rationale of Young v. United States, the three-year lookback period of B.C. § 507(a)(8)(A)(I) should not be computed by including an additional six months based on I.R.C. § 6503(h).

Discussion

The Supreme Court, in Young v. United States, 122 S. Ct. 1036 (2002), held that the three-year lookback period of B. C. § 507(a)(8)(A)(I) is a limitations period subject to equitable tolling. Equitable tolling automatically applies and is appropriate whenever the Internal Revenue Service has been prevented by reason of a prior bankruptcy from collecting its claim, regardless of whether the bankruptcy petition was filed in good faith. Therefore, in accordance with the Young holding, the lookback period of B.C. § 507 is tolled during the pendency of a prior bankruptcy petition. Further, the automatic tolling rule adopted in Young will determine the priority or dischargeability of any tax debt unless a court has issued a final order on the priority or dischargeability of the debt and all applicable appeal periods have expired.

Before Young, certain circuits held that the three-year lookback period was tolled during the period the Service was prohibited from collecting the tax by reason of the prior bankruptcy case, and, in reliance on B.C. § 108(c), for the additional six months provided in I.R.C. § 6503(h). See, e.g., In re West, 5 F.3d 423 (9th Cir. 1993), cert. denied, 511 U.S. 1081(1994); In re Montoya, 965 F.2d 554 (7th Cir. 1992). In light of the rationale of Young, the three-year lookback period of B.C. § 507(a)(8)(A)(I) should not be computed by including an additional six months, based on I.R.C. § 6503(h).

Any questions about this notice should be directed to Collection, Bankruptcy & Summonses,
Branch 2 at 622-3620.
/s/
DEBORAH A. BUTLER
Associate Chief Counsel
Procedure and Administration

5) In the Internal Revenue Service Collection function (ICS) case history printout dated June 1, 2006, Exhibit 8 to The Stipulation of Facts, the following statements appear under action date 05/05/2006, the next to last page.

> Need to discuss the issue the TP brought up about IRS not being allowed to add 6 months to the CSED. POA states Young v. United States, 122 S.Ct. 1036 and Notice CC-20020023 issued by the Office of Chief Counsel. Spoke with BK Advisor Johnson - the Young case does not address the extension on the CSED. Briefly- it involves a lookback period for determining dischargeability. **Advisor Johnson also indicated that Laguna Niguel counsel does not allow the 6 month extension on every BK filed by a TP and also does not allow for an over-lapping of extensions due to an OIC filing.** (emphasis added)

Attorney Carmellino's letter also discussed the effect of R.R.A. §3461 and IRC §§ 6501(c) and 6502(a). He pointed out that ***"Any extension of the collections statute already in effect on December 31, 1999, expired on December 31, 2002."*** Attorney Carmellino pointed out that the literature makes it clear that the IRS routinely tries to collect taxes after the statute of limitations has expired, and that this abuse had been addressed by Congress. The final paragraph of Attorney Carmellino's letter reads as follows:

> The Internal Revenue Manual Section 5.12.6.5.1 (10-01-2003) Certificate of Release provides at number 7. ***Issue a certificate of release if the collection statute has expired, and the taxpayer requests a release.*** (Emphasis added) If it has not previously been made clear, Mr. Toothacre does hereby request that certificates of release be issued immediately for tax years 1040 93 and 1040 94.

A true and correct copy of Attorney Carmellino's letter of **January 18, 2006,** is marked Exhibit "G" to Exhibit #17 of the Stipulation of Facts and made a part hereof as though set forth here in full.

10 On **January 19, 2006,** Attorney Carmellino wrote a letter to Revenue Officer Martinez, in which he advised her that in reviewing The San Diego Daily Transcript he discovered that, on **December 21, 2005,** the IRS caused to be recorded two Notices of Federal Tax Liens against Toothacre & Pedestrian. (Sic) a Partnership. Neither Mr. Pederson nor Mr. Toothacre received any notice whatsoever of this action by the IRS. This event is, without doubt, the most convincing evidence that Revenue Officer Martinez abused her discretion and was intent on punishing Petitioner. Revenue Officer Martinez had previously been furnished the Certificates of Release of Federal Tax Liens by Petitioner. The last day for filing either of those documents was in 2002. Attorney Carmellino's letter dated January 19, 2006, stated:

> I am enclosing copies of those Certificates of Release of Federal Tax Liens for your information, although Mr. Toothacre provided these to you by his previous letter. As indicated on the face of these documents the last days for refiling (CSED) were in 2002. As you know this is 2006. The collection statute has run. **The Collection Statute Expiration Date came and went over three years ago. You must be fully aware of these facts.**

Attorney Carmellino's letter further stated:

> **It is patently obvious that the refiling of these liens is malicious and an obvious attempt by the Service to bully my client and destroy his life. All of this in violation of your own Manual and the Taxpayer Bill of Rights. Mr. Toothacre**

is trying to pay those taxes which are due, and collectible, and you are making every effort to thwart his attempts. (emphasis added)

(17) A copy of Attorney Carmellino's letter dated January 19, 2006, together with the newspaper article and copies of the Certificates of Release of Lien are attached as Exhibit H to Exhibit # 17 of the Stipulation of Facts and made a part hereof as though set forth here in full. Actually, Revenue Officer Martinez caused three Notices of Federal Tax Liens purportedly against the Toothacre & Pederson Partnership to be recorded. Two were recorded on December 22, 2005 and the third was recorded on January 3, 2006. **All three of these recordings were done more than three years after the previously recorded liens had self released and after all prior liens had been released by the issuance of Certificates of Release of Liens.** Attached as Exhibit # 25 to Augmentation to the Administrative Record are true and correct copies of three Notices of Federal Tax Liens, all bearing recording information of the San Diego County Recorders Office. Two were recorded on December 22, 2005, indicating that they had been prepared by A. Martinez, Revenue Officer at San Diego, CA, on the 21st day of December, 2005. They both purport to be against Toothacre & Pederson, a partnership and both reflect that the year of the date of assessment was 1992, more than 13 years prior to the date of recording. The third Notice of Federal Tax Lien also purports to be against Toothacre & Pederson, a partnership and was recorded on January 3, 2006 at the San Diego Recorders Office. It indicates that it was prepared by Susan A. Hansen, SPF Advisor, on the 21st day of December, 2005. It also indicates that the date of the year of assessment was 1992.

(18) On **December 22, 2006,** Petitioner filed a Request for a Collection Due Process Hearing concerning the liens which were filed against the partnership. By letter dated November 28, 2006 Petitioner received a Decision Letter Concerning Equivalent Hearing Under Section 6320 and/or Section 6330 of the Internal Revenue Code. That letter stated:

> **The liability for the Form 941 for the quarter ending December 31, 1991 is no longer legally enforceable because the collection statute expired. The Notice of Federal Tax Lien will be released by Compliance.**

That letter was signed by Kathleen A. Flatau, Appeals Team Manager.

(19) Revenue Officer Martinez never replied in writing to **any** of Attorney Carmellino's letters.

III. ASSESSMENT DATE FOR CSED PURPOSES CONCLUSIVELY ESTABLISHES THAT THE TAXES IN QUESTION ARE NO LONGER COLLECTIBLE

Petitioner and the IRS have had a running dispute as to the date the assessment was made and the Collection Statute began to run. Petitioner contends that the 1993 and 1994 returns were self assessing tax returns and that the assessment date was the date that the returns were received by the IRS. Ms. Chadwell, the AO, in her Case Activity Record Print, on page one, states: ***"93 is a late filed joint self assessed return."*** (first page of Case Activity Record Print)

Petitioner retained the expert services of Victoria Osborn, Certified Fraud Examiner, Public Accountant and Forensic Accountant. Ms. Osborn found that the 1993 and 1994 taxes were uncollectible. Her letter is attached to the Stipulation of Facts as part of Exhibit #15 and made a part hereof as though set forth here in full. In that letter Ms. Osborn states on page 2:

> The master file is consistent with Ms. Chadwell's statement that the "*assessment dates for the 1993 and 1994 years are May 1, 1995 and June 5, 1995.*" However the running of the statute of limitations for self assessed returns begins with the "return received date" which is March 27, 1995 (1993) and April 15, 1995 (1994) and not the assessment date. See 26 *USC* 6501.

Ms. Chadwell, the AO, in her Case Activity Record Print on the last page in the entry dated 9/22/2005 refers to Ms. Osborn's August 17, 2006 letter stating:

> On second review of letter from TPS Accountant determined it was premature to close CDP without addressing issues raised regarding statute. CPA quoted IRC on what date is used for calc of SOL **but I don't believe it.** (emphasis added)(impartiality?)

No one from the IRS ever answered the question raised regarding the collections statute.

Petitioner's expert forensic accountant concluded that the Statute of Limitations begins to run when the tax return, which is self assessing, is filed with the IRS. The Internal Revenue Manual (IRM) provides in part as follows:

> **4.7.3.3 (07-31-2000)**
>
> **Approval Authority**
>
> 3. Statute of limitation **dates are created when the tax return is filed** with a campus. This date is created on the Master File and is the date created on ERCS from AIMS. Generally there are three reasons a statute would be updated on the ERCS system. (emphasis added)

Section 6151(a) of the Internal Revenue Code, 26 U.S.C. 6151, provides in relevant part:

> Except as otherwise provided in this subchapter, when a return of tax is required under this title or regulations, the person required to make such return shall, without assessment or notice and demand from the Secretary, pay such tax to the internal revenue officer with whom the return is filed, and shall pay such tax at the time and place fixed for filing the return (determined without regard to any extension of time for filing the return).

The following discussion of when the statute of limitations begins to run in connection with the collection of tax appears in The CPA Journal a publication by the New York State Society of CPAs:

> **Determining the Statute of Limitations in Federal Tax Case**
> *By Robert H. Breakfield and Charles E. Alcvis*
> August 2006.
>
> A tax preparer's knowledge of the IRS tax collection statute of limitations (the legal bar to the collection of delinquent taxes) can be of valuable assistance to the taxpayer faced with a federal tax liability.
>
> There are two basic statutes of limitation. First is the statute of limitations set forth in IRC section 6501(a), which provides that the IRS has three years to assess an additional tax due. For example, for a taxpayer who filed a 2004 tax return on April 15, 2005, the IRS has until April 15, 2008, to assess an additional tax. This rule has two major exceptions. The three-year statute is extended to six years in a case where the taxpayer has omitted more than 25% of gross income [see IRC section 6501(e)(1)(A)]. Second, there is no statute of limitation in cases where no return has been filed, or where the taxpayer has filed a fraudulent return [see IRC sections 6501(c)(1), 6501(c)(2), and 6501(c)(3)]. These two exceptions permit the IRS to assess an additional tax at any time.
>
> Less understood is the second basic statute of limitations that defines the period of limitation for the collection of the tax. IRC section 6502(a)(1) establishes a statute of limitation collection period of 10 years.
>
> Taxpayers faced with a collection action must know the general rule of limitation and the circumstances when the statute is extended by agreement or by law.
>
> When the Statute Begins to Run
>
> Identifying the date on which the running of the collection statute commences depends upon the date the tax is assessed. (See IRC section 6203 and Treasury Regulations section 301.6203-1.) ***The assessment of the tax begins with the filing of the tax return, or with the final determination in the examination process.*** The assessment is not the same as the filing of the return. In the case of a paper return mailed to a service center or an electronically filed return, the assessment occurs when the assessment officer signs Form 23C, Assessment Certificate—Summary Record of Assessment. According to Treasury Regulation 301.6203-1, the assessment shall be made by an assessment officer signing the summary record of

assessment. The U.S. Tax Court has upheld the use of computer-generated Revenue Accounting Control Report 006 (Summary Record of Assessment) in lieu of a hand-signed Form 23C [see *Thomas W. Roberts v. Comm'r*, 118 TC 365 (2002)].(emphasis added)

Certain cases involve both an initial assessment and a subsequent assessment [IRC section 6204(a)]. The last assessment of the tax is the commencement date of the 10-year statute period. If a taxpayer files a paper return with the service center on April 15, 2005, the actual assessment of the tax may not occur until June or July 2005, when the assessment entry is made on the IRS's records (Treasury Regulations section 301.6203-1). If, however, the taxpayer's return is subject to examination and a subsequent assessment is made, the new period for the 10-year statute will commence with the recording of the second assessment [Treasury Regulations section 301-6502-1(a)(1)]. If the original return was filed with an unpaid balance due and a subsequent examination of the return resulted in a second assessment, then there will be two 10-year statutory periods. The initial balance assessment will start the 10-year statute for the first assessment; the balance due created by the subsequent examination will start the 10-year statute for the second assessment.

Precisely when the statute of limitation has commenced can be ascertained from a transcript of the taxpayer's account, which can be obtained by filing IRS Form 4506-T. The transcript of the taxpayer account will identify the date of all assessments with respect to the tax years at issue. Securing the transcript of account is an essential step to properly verify the time remaining on the collection of statute.

The Internal Revenue Service has consistently taken the position that the Date of Assessment of the 1993 taxes was 5/31/95 and that the Date of Assessment of the 1994 taxes was 06/05/95. Contrary to the IRS position, Petitioner was furnished by the IRS an Internal Revenue Document entitled **490 Activity Summary** [redacted]? Fed [redacted]? Rodney M & Marcia L Toothacre 1040 Tax Period: 1993/12. A true, correct and accurate copy of that document is attached as Exhibit #5 to Exhibit #3 of the Stipulation of Facts and made a part hereof as though set forth here in full. A review of that document reveals that at two different places under date of 4/15/1994, it is stated that the return is filed ***and the tax is assessed***. (emphasis added). Ms. Chadwell, in her Case Activity Record Print, on the top of page two disingenuously states:

Transcript TP provided showing assmt date for 1993 as 4/15/94 is not an IRS Transcript. Bottom shows copyright decision Modeling, Inc. is a DMI third party vendor software program. This is not an IRS transcript containing information on the account from IDRS.

Ms. Chadwell admits that the IRS furnished this document to petitioner. In fact on page 52 of Exhibit #8 to The Stipulation of Facts, Revenue Officer Martinez states:

RECEIVED ANOTHER FAXED LETTER FROM MR. CARMELLINO REQUESTING A CALL BACK TO DISCUSS THE LEVY PROCEEDS RECEIVED FROM SSA WHICH HAVE BEEN APPLIED TO THE TPs 9312 TAXES WHICH ACCORDING TO THE TP AND MR. CARMELLINO ARE UNCOLLECTIBLE. THE TP PROVIDED MR. CARMELLINO WITH A **COPY OF THE 490 ACTIVITY SUMMARY, THE TP RECEIVED FROM CINCINNATI SHOWING THE ASSESSMENT DATE FOR 1993 WAS 04/04/94.** MR. CARMELLINO IS REQUESTING A CALL BACK TO DISCUSS THE LEVY AMOUNTS TAKEN AND TO MAKE ARRANGEMENTS FOR THE TPs REFINANCE ESCROW TO CLOSE WITHOUT FURTHER INTERFERENCE FROM THE IRS. (emphasis added)

This IRS document furnished to the Petitioner by the Internal Revenue Service and as such is an admission and a declaration against interest. As a matter of fact, Petitioner has discovered that the document in question is an attachment to a document sent to Petitioner and his wife by the IRS on or about July 18, 2005: "**Urgent!! We intend to levy on certain assets. Please respond NOW** The law requires that you pay your tax at the time you file your return." The notice is dated July 18, 2005 and was issued by the Internal Revenue Service in Ogden, UT 84201-0030. That notice was served on Petitioner with an attachment Notice 1212 and a document concerning Penalty and Interest (2 sided) and the document entitled **Activity Summary.** The total amount of $264,174.71 on the notice coincides with the figure of $264,174.71 on the Activity Summary Sheet. The Activity Sheet states: "4/14/94 150 Return Filed & Assessment of Tax 92,666.00" A copy of the entire document served on Petitioner is marked Exhibit # 18 to the to the Administrative Record and made a part hereof as though set forth here in full.

A review of Exhibit #s 10 and 11 to The Stipulation of Facts reveals that Exhibit 10-J is a copy of the Internal Revenue Service Certificate of Assessments, Payments, and other Specified Matters dated June 20, 2006 with respect to Petitioner's income tax account for the tax year 1994 and Exhibit 11-J is s a copy of the Internal Revenue Service Certificate of Assessments, Payments, and other Specified Matters, dated June 20, 2006, with respect to Petitioner's income tax account for the tax year 1993. Exhibit # 11-J clearly states:

03-27-1995 RETURN FILED & TAX ASSESSED

Exhibit 10-J clearly states:

04-15-1995 RETURN FILED AND TAX ASSESSED

Each of these exhibits bearing the date of August 8, 2005 state:

"FEDERAL TAX LIEN RELEASED."

Also Exhibit 6, which is described in the Stipulation of Facts as "a copy of the Case Activity Records (case notes) maintained by Settlement Officer Chadwell in connection with her consideration of petitioner's CDP request" **shows** that the Assessment Statute Ending Date is 03271998 which coincides exactly with the dates reflected on the document that is claimed not to be an IRS document.

IV. THE NOTICE OF FEDERAL TAX LIEN EXPIRED BY ITS OWN TERMS

The original Notice of Federal Tax Lien, dated January 30, 1997 and recorded in the records of the San Diego County Recorder's Office on February 4, 1997, contains, on its face, the following information. (See Exhibit #2 of Exhibit #3 of the Stipulation of facts.)

> **IMPORTANT RELEASE INFORMATION:** For each assessment listed below, unless a notice of the lien is refiled by the date given in column (e), this notice shall, the day following such date, operate as a certificate of release as defined in IRC 6325(a).

Accordingly the Notice of Federal Tax Lien on May 31, 2005 and July 5, 2005 became Certificates of Release and released the liens claimed. A true, correct and accurate copy of the original Notice of Federal Tax Lien attached to the Stipulation of Facts, as Exhibit #2 to Exhibit #3 and made a part hereof as though set forth in full.

Alvin S. Brown, tax attorney, formerly with the Office of the Chief Counsel of the Internal Revenue Service, in an article entitled Tax Regs in Plain English - IRS Restructuring and Reform Act of 1998 Section 3461, Procedures for Extension of Statute of Limitations by Agreement, states:

> **Section 3461**
>
> **A. Provision(s) covered:** R.R.A. §§ 3461. Procedures Relating to Extensions of Statute of Limitations By Agreement. I.R.C. §§§§ 6501(c) and 6502(a).
>
> **B. Background:** Section 6501 of the Internal Revenue Code generally provides that the Service has three years from the date a return is filed to assess additional taxes. Section 6502 generally provides that the Service has ten years from the date of assessment to collect the tax. Prior to the expiration of the limitations period

provided by these provisions, the law provided that the taxpayer and the Service could agree in writing to extend the statute of limitations. Congress believed that many taxpayers were not being informed of their rights to refuse to extend the statute of limitations on assessment or to limit the scope of any such extension. In addition, Congress believed that all taxes should be collected within the 10 year statute and that the statute should not be extended.

C. **Change(s):** The authority to extend the collection statute of limitations by agreement ends on December 31, 1999. **Any extension of the collection statute already in effect on December 31, 1999, will expire on December 31, 2002.** An exception to this section is provided for extensions related to installment agreements. An extension of the collection statute entered into in conjunction with the acceptance of an installment agreement should be for the period necessary to satisfy the tax liability via the agreement. The legislation provides that the period of limitations for extensions related to installment agreements will expire 90 days after the end of the extension period. (emphasis added)

V. THE INTERNAL REVENUE SERVICE RELEASED THE LIENS RENDERING THE TAXES UNCOLLECTIBLE

The Internal Revenue Service's attempt to revoke previously released liens was invalid. In addition to the fact that the lien(s) expired by its (their) own terms, there was also a Certificate of Release of Federal Tax Lien issued by the Internal Revenue Service on August 8, 2005. That Certificate of Release of Tax Lien was signed by the Director, Payment Compliance. A true, accurate and correct copy of that Certificate of Release of Federal Tax Lien is attached to Exhibit #3 to the Stipulation of Facts (Request for CDP Hearing) marked Exhibit #3 to that document and made a part hereof as though set forth here in full. Internal Revenue Code §6325 (f) provides in part as follows:

Except as provided in paragraphs (2) and (3), if a certificate is issued pursuant to this section by the Secretary and is filed in the same office as the notice of lien to which it relates (if such notice of lien has been filed) such certificate shall have the following effect:

A) in the case of a certificate of release, such certificate shall be conclusive that the lien referred to in such certificate is extinguished; (emphasis added)

Petitioner's expert Forensic Accountant, Ms. Osborn, in her letter dated August 12, 2006, Exhibit #15 to the Stipulation of Facts, on page 2 states:

Issue #3: The lien was released, the lien refiling date had passed, and you were not given timely notice of the lien filing.

The CSED has been **sanitized** from the literal transcript printed on 8-3-2006 and the IMF MCC TRANSCRIPT-SPECIFIC printed on May 11, 2006 you received from the IRS Disclosure office. This information is critical to your issues.

These master file transcripts also contain the appropriate litigation indicator for the bankruptcy petition and its discharge and the subsequent offer in compromise described in Ms. Chadwell's letter of July 17, 2006. However, following all of the above information **a voluntary decision was made to release the Federal tax liens. It is important to know that these liens did not "self release" and are not eligible for reinstatement.** (emphasis added)

The transactions in the master file accounts for Form 1040 for tax periods 1993 and 1994 and Form 941 for tax period ending December 31, 1991 are consistent with a decision that the liability assessed together with all interest and penalties have become legally unenforceable. *See 26 USC 6325(A)(1).* Ms. Chadwell's letters dated July 17, 2006 and August 3, 2006 do not identify a calculated collection statute expiration date even though she alleges the statute was open when you submitted your request for a collection due process hearing. (emphasis added)

In her Case Activity Record Print Ms. Chadwell states on the second page:

3. Lien was released and the IRS issued a Certificate of Release. **The TP was not given timely notice of the lien filing.** The NFTL on the 1993 and 1994 years was not refiled timely so the a (sic) certificate of release of the NFTL was erroneously issued. IRC 6325(f)(2) gives the IRS authority to revoke the release and reinstate the lien. A new lien was filed under IRC 6323(f) so that the reinstated lien will be valid against any lien or interest in 6323(a). ***Per IRM new lien has to be filed after the notice of revocation is mailed to the TP and recorded.*** **The effective date of reinstatement is the date the IRS mails the notice of revocation to the TP but not before the date the notice is filed at the SDCR.** ***I will need a copy of the notice of revocation.*** **Per ALS the new lien was recorded (sic) 12/05/05 with REC #2005-1042915.** ***Hopefully the notice of revocation was recorded and mailed to the TP before this date.*** **ALS shows 12/7/05 as 3172 date yet copy of 3172 shows 12/13/05. The difference may be due to fact RO manually filed lien. Also noted that lien filing date on notice is given as 12/06/05 when ALS and ICS shows the actual recording date to be 12/5/05. 5 business days after recording date is 12/12/05. IRC 6320(a)(2)(c)** Thus it can be argued that notice was issued one day late. However as far as I am concerned this is an administrative error that does not invalidate the NFTL. Based on wording in TPS appeal he claims that he was not notified with 5 business (sic).(emphasis added)

As a matter of fact the **Notice of Revocation was not** recorded and mailed to the TP before August 5, 2005. On **February 2, 2006**, Petitioner received, in his residential mail box, an envelope which was "franked" **January 30, 2006** in Cincinnati, Ohio. In that envelope was a Revocation of Certificate of Release of Federal Tax Lien. That document appears to have been prepared and signed at Laguna Niguel, California, on **December 1, 2005.** The receipt of the envelope by Petitioner was witnessed on **February 2, 2006**, by Jane T. Schiffmann in handwriting on the envelope. The

Revocation of Certificate of Release of Federal Tax Lien received by Petitioner on **February 2, 2006** has **no** recording information. The document, envelope and a declaration by Mrs. Schiffmann are attached to the to the Augmentation to the Administrative Record as Exhibit # 24 and made a part hereof as though set forth herein full. For some unknown reason it took the Internal Revenue Service from December 1, 2005 until February 2, 2006 to notify Petitioner that this action was being taken.

Further evidence of the fact that the subject Notices of Tax Liens had expired, both by their own terms by self releasing, and also by voluntary act of the IRS, are two documents which were issued by the Lien Unit Manager of the Internal Revenue Service. Both of these documents are intended to be "Beneficiary Statements" or "Pay Off Notices" to be placed in Petitioner's refinance escrow.

The first of the documents is dated August 5, 2005, and was addressed to Fidelity National Title Company % Natalie Dorsi at 5060 Shorea Place, Ste. 130, San Diego, CA 92122. Ms. Dorsi was/is the escrow officer handling Petitioner's refinance escrow. That document 'purports to reflect **all** tax liens filed in San Diego County, CA affecting Petitioner's residence and listed the tax liabilities for which there were filed liens. There is no mention of a lien for either tax year 1993 or tax year 1994. The total payoff figure set forth in the August 5th document was $147,528.16. The second document is dated September 3, 2005, also issued by the Lien Unit Manager of the IRS and addressed to Rodney M & Marcia L Toothacre at the residence address. This document also was intended to be a beneficiary statement and it reflects a payoff figure of $90,504.31. The reduction from the previous pay off figure is accounted for by the fact that liens against the partnership TOOTHACRE & PEDERSON had been removed, both by self releasing and by action of the IRS in issuing Certificates of Release of Liens.

The second document specifically states that the taxes for tax years 1993 and 1994 had been assessed, "but liens have not been filed". True and correct copies of both of these documents are attached to the Augmention to the Administrative Record as Exhibit # 24 and made a part hereof as though set forth in full. These documents clearly establish that as far as the Lien Unit of the IRS was concerned, in August and September of 2005, there were **no valid liens concerning tax years 1993 and 1994.**

Presented herewith as Exhibit #s 20, 21, and 22 to the Augmentation to the Administrative Record are copies of three documents which were certified by the San Diego County Recorder all of which by this reference are made a part hereof as though set forth in full.

Exhibit #21 which consists of two pages and is a Notice of Federal Tax Lien. The Notice indicates that it was prepared and signed at Laguna Niguel, California on the 2nd day of December, 2005. It is signed by A. Martinez, the Revenue Officer. The recording information indicates that this document was recorded with the San Diego County Recorders Office on December 5, 2005 at 8:19 AM. This is the document that Ms. Chadwell is referring to above "Per ALS the new lien was recorded (sic) 12/05/05 with REC #2005-1042915".

Exhibit # 22 to the Augmentation to the Administrative Record is a copy of a certified copy of a Notice of Federal Tax Lien which appears to have been prepared and signed at Laguna Niguel, California on the 2nd day of December, 2005. This Notice is signed by Susan A. Hansen for A. Martinez. It covers the exact same information as the previous notice concerning the tax years, taxpayers etc, but the forms are different and the second one bears recording information indicating it was recorded at the County Recorder's Office on **December 16, 2005** at 11:26 AM.

Exhibit #20 to the Augmentation to the Administrative Record is a copy of a certified copy of a Revocation of Certificate of Release of Federal Tax Lien which appears to have been prepared and signed at Laguna Niguel, California on the 1st day of December, 2005, by Susan A. Hansen, Director, Campus Compliance Operations. This Revocation of Certificate of Release of Federal Tax Lien bears recording information that it was recorded on **December 16, 2005** at 11:26 AM. The Revocation of Certificate of Release of Federal Tax Lien which Taxpayer received on February 2, 2006, in an envelope which bears the franking date of January 30, 2006, is different from the Certificate which was actually recorded. Ms. Chadwell stated:

> Per IRM new lien has to be filed **after** the notice of revocation is mailed to the TP and recorded. The effective date of reinstatement is the date the IRS mails the notice

of revocation to the TP but not before the date the notice is filed at the SDCR. I will need a copy of the notice of revocation Per ALS the new lien was recorded (sic) 12/05/05 with REC #2005-1042915. **Hopefully** the notice of revocation was recorded and mailed to the TP before this date" (emphasis added)(impartiality?)

The Internal Revenue Manual provides as follows:

5.12.3.26 (09-07-2006)

Filing of Revocation Certificates and Notices

All certificates and notices will be filed in the same office where the original filing took place, unless the state has since redesignated its filing office for the specific type of property. The Uniform Federal Lien Act of the state should be checked to confirm where to file the certificate or notice.

Expenses related to the filing or recording of certificates will be borne by the government.

In the event that these certificates and notices may not be filed in the office designated by State law, they are to be filed in the office of the clerk of the United States district court for the judicial district in the State office where the NFTL is filed.

When filing a Certificate of Revocation and a new Notice of Federal Tax Lien, documents must be recorded in the proper order to be valid. The Certificate of Revocation must be recorded prior to the new Notice of Federal Tax Lien. (emphasis added)

5.12.3.23 (09-07-2006)

Revocation of Certificate of Release or Nonattachment

IRC §§ 6325(f)(2) provides for a revocation of a certificate of release or non attachment and the reinstatement of the NFTL to which the certificate relates.

A certificate of revocation may be issued when it has been determined that a release of FTL or a certificate of nonattachment was issued:

erroneously, improvidently, or in connection with a collateral agreement entered into in connection with a compromise under IRC §§ 7122 which has been breached, and if the period of limitation on collection after assessment has not expired.
Issue a Certificate of Revocation to revoke a self-releasing NFTL in those instances when new NFTL has been filed late.

Use Form 12474, Revocation of Certificate of Release of Federal Tax Lien to revoke the release when the lien was not self-releasing.

Use Form 12474-A, Revocation of Certificate of Release of Federal Tax Lien to revoke a lien that self-released.

A new Notice of Federal Tax Lien should be filed to protect the priority of the lien after the Certificate of Revocation is filed. See IRM 5.12.3.25.

When revocation is required, a request will be sent to Advisory to have the Lien Processing Unit, prepare the certificate and file a new NFTL (emphasis added)

The copies of Certificates of Release of Federal Tax Liens included in Exhibit #s 19 & 20 of the Augmentation of Administrative Record prove that in neither case was Form 12474-A used by the IRS. In each case the form utilized was 12474. Form 12474, provides: "I certify that we mistakenly issued a certificate of release of the Notice of Federal Tax Lien etc"...: whereas Form 12474-A provides: "I certify that we mistakenly allowed a Notice of Federal Tax Lien filed against the taxpayer named below to operate as a Certificate of Release...".

Revenue Procedure 2000-43 prohibits ex parte communications that appear to compromise the Appeals Office. Actual influence isn't required, only a reasonable possibility that the prohibited communications may have compromised the Appeals officer's impartiality. See *Drake* 125 T.C. at 209-20. Petitioner submits that Ms. Chadwell was anything but impartial. This evidence is irrefutable proof that the IRS and its employees fraudulently attempted to collect uncollectible taxes.

Also the Internal Revenue Service Collection function (ICS) case history printout dated June 1, 2006, Exhibit 8 of the Stipulation of Facts, the following appears under the action date of 10/18/05:

SPOKE WITH GM LATE P.M. 10/17/05 REGARDING THE LIEN AND STATUTE ISSUE. **GM STATED THE CERTIFICATE OF RELEASE SHOULD NOT HAVE BEEN ISSUED ON A SELF RELEASING NFTL.** WE REVIEWED THE STATUTE DATES AND THE DATES OF THE BANKRUPTCY AND THE OFFER. GM SUGGESTED THAT I MEET WITH A BANKRUPTCY TECH TO COMPLETE RESEARCH ON PACER REGARDING THE FIRST TC 520/521. R/O IS THEN TO MAIL AC REGARDING THE ISSUE OF THE FIRST 520/521 AND THE EXTENSION OF THE STATUTE PRIOR TO THE TC 150 DATE. GM REQUESTED A

FAXED COPY OF THE CERTIFICATE OF RELEASE FOR HER REVIEW. FAXED THE LIEN RELEASE AND THE ESCROW DEMAND ISSUED BY CINCINNATI. (Emphasis added)

At page 44 of the Internal Revenue Service Collection function ICS case history printout dated June 1, 2006, Exhibit 8 of the Stipulation of Facts, the following appears under the action date of 10/18/05:

> I ADVISED TP THAT THE NFTL WILL BE REINSTATED. HE STATED THAT I ENJOYED RUINING HIS LIFE. I STATED THAT WAS NOT TRUE AND ADVISED THE TP OF HIS CAP RIGHTS. HE STATED WHAT GOOD WOULD THAT DO, HE WILL HAVE TO HIRE AN ATTORNEY AT THIS POINT. I ALSO ADVISED THE TP OF HIS CDP RIGHTS AFTER THE LIEN IS FILED. **TP ASKED WHY THE LIENS HAD BEEN RELEASED. I STATED I DID NOT KNOW THE ANSWER. IT COULD HAVE BEEN DUE TO THE REFILE PERIOD OF THE LIEN, WHICH WAS WHEN THE TP WAS IN THE OFFER STATUS.. HOWEVER, THE EXPIRATION OF THE REFILE PERIOD WOULD NOT JUSTIFY THE CERTIFICATE OF RELEASE OF LIEN.** (emphasis added)

VI. THE INTERNAL REVENUE SERVICE ENGAGED IN IMPROPER *EX PARTE* COMMUNICATIONS

The Internal Revenue Manual (IRM) provides, in part, as follows:

> **13.1.2.6 (10-31-2004)**
> **RRA98 §§ 3417 Third Party Contacts**
> **RRA98 §§ 3417/IRC §§ 7602(c)** specifies requirements when third party contacts will be made in connection with working a case. Basically, IRS employees are prohibited from contacting persons other than the taxpayer about the collection or determination of a tax without first giving the taxpayer reasonable notice that such contacts may be made. Refer to **IRM 11.3, Disclosure of Official Information for Third Party Contact** procedures.

The IRS has been guilty of inappropriate and improper *ex parte* communications with regard to the instant case. One improper *ex parte* communication is found in Exhibit # 5 to the Stipulation of Facts. That document is entitled Case Activity Record Print. It indicates that the Appeals Officer (AO) is Cynthia Chadwell. She is sometimes referred to as Settlement Officer (SO) The very first entry by Ms. Chadwell, the Appeals Officer reads as follows:

> Received case file from screener per litigation advisor in laguna, this TP has a damage suit pending relating to the lien.

In truth, Petitioner did not have a damage suit pending relating to this lien or any other lien. He did, however, in an attempt to get some sort of cooperation out of the Revenue Officer or anyone else at the IRS, prepare and submit a Notice of Intention To Sue The United States of America. That document, together with all of its attachments is attached to the Stipulation of Facts as Exhibit #18 and made a part hereof by this reference. That document clearly establishes the many many attempts the taxpayer made to obtain some sort of cooperation from the IRS, and his offers to get the undisputed taxes paid in full.

Also the Case Activity Record Print Exhibit # 5, attached hereto and made a part hereof as though set forth in full, which was produced to petitioner prior to this matter had the first several lines on page two (2) redacted so that it could not be read. The Case Activity Record Print provided in connection with this trial is unredacted, the redacted language irrefutably establishes that the IRS engaged in improper *ex parte* communications.

> CDP received on 4/3/06. Assigned to this SO on 5/16/06. **Was notified by Litigation Advisor** in Laguna Niguel that **TP had a damage suit pending** relating to the lien filing. Also have CDP on related Pship entity with same issues 5/5/06 ICS History Entry by Litigation Advisor shows possible different CSED computation. (emphasis added) (CDP Collection Due Process Hearing) (SO Settlement Officer)

The IRS has failed to produce any information whatsoever concerning a "possible different CSED computation."

Another clearly inappropriate *ex parte* communication is a memorandum from the Revenue Officer Martinez, to Karen Buhrow, Lien Advisor thru Patricia Medina, Abusive Tax Avoidance Transactions (ATAT) Group Manager 3100 dated November 07, 2005. That memorandum is Exhibit #9 to the Stipulation of Facts. In that letter Revenue Officer Martinez stated: "The taxpayer owes 1040 income tax for the tax years 1993, 1994, 1995, 1996, 2003 and 2004"

IRC Section 6330 sets out the process for administrative review or decision by the IRS to levy on taxpayers' property. One of the protections that section gives taxpayers is a promise that the hearing will be conducted by an IRS employee who is impartial. (Sec. 6330(b)(3).) Congress reinforced this requirement by directing the Commissioner to reorganize the IRS so that the entire IRS Appeals function would be independent. (Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. 105-206, sec. 1001(a), 112 Stat. 689.) The Commissioner then made the guarantee of impartiality part of the IRS's standard operating procedure by issuing Revenue Procedure 2000-43, 2000-2C.IB. 404. This procedure prohibits *ex parte* communications by IRS employees that would appear to compromise the independence of an Appeals Officer. *United States Tax Court* - Memorandum Decision, T.C. Memo 2007-93; Docket No. 14928-04L; Filed April 23, 2007. The Court in finding inappropriate *ex parte* communications stated:

> There can't be any suspense in our holding on this point-the cover letter sent to Talbott that accompanied the administrative file was precisely the sort of prohibited *ex parte* contact that the Commissioner and Congress wanted to ban. It put the revenue officer's spin on what he thought of Wells and Industrial, and blatantly advocated a particular result. In two recent cases, *Drake v. Commissioner*, 125 T.C. 201 (2005), *and Moore v. Commissioner*, T.C. Memo. 2006-171, we held that communications very similar to the cover letter in this case were likewise prohibited *ex parte* communications...
>
> This needs to stop. Congress wanted to give taxpayers an opportunity to appeal their case to an IRS employee who would take a fresh look at the facts. *Ex parte* contacts not only undermine the impartiality of the officer hearing the appeal, but are especially pernicious because they are so hard to detect. Wells only discovered the cover letter sent to Talbot because, as a lawyer, he was savvy enough to ferret out its existence from a reference in the Appeals Officer's case activity report...
>
> Revenue Procedure 2000-43 prohibits *ex parte* communications that *appear* to compromise the Appeals office. Actual influence isn't required, only a reasonable possibility that the prohibited communications may have compromised the Appeals officer's impartiality. See *Drake*, 125 T.C. at 209-20.

VII. CONCLUSION

As demonstrated herein, the IRS has acted illegally and unconscionably with regard to this taxpayer. The IRS has engaged in improper *ex parte* communications; it has fraudulently back dated documents to make it appear that the IRS complied with mandatory provision of both the IRC and the IRM, when refiling liens which were previously released both by self releasing and by the issuance and recordation of Certificates of Release of Federal Tax Liens and not subject to refiling in any event.

Revenue Officer Martinez falsely, fraudulently and maliciously interfered with taxpayer's escrow causing the escrow to fall through resulting in monetary and emotional damages to taxpayer.

WHEREFORE petitioner requests the taxes for tax years 1993 and 1994 be ordered uncollectible.

Respectfully submitted:

Dated: December 14, 2007

Rodney M. Toothacre
Rodney M. Toothacre, *pro se*

Rod M. Toothacre (State Bar No. 033048)
13742 Indian Peak Trail
Poway, California 92064
(858) 513-0217

UNITED STATES TAX COURT

Toothacre v. Commissioner **Docket No: 26357-06"L"**

PROOF OF SERVICE BY U.S. MAIL

I, declare that: I am over the age of eighteen years and not a party to the action; I am employed in, or am a resident of the County of San Diego, California, where the mailing occurs; and my business address is: Post Office Box 500347, San Diego, California 92150-0347.

On December 14, 2007, I served the following document(s): **PETITIONER RODNEY M. TOOTHACRE'S TRIAL BRIEF;** by placing a copy thereof in a separate envelope for each addressee respectively as follows:

Karen Nicholson Sommers
General Attorney
DEPARTMENT OF THE TREASURY
Internal Revenue Service
701 "B" Street, Suite 901
San Diego, California 92101
(619) 557-6014
Fax: (619) 557-6581

I then sealed each envelope and, with postage thereon fully pre-paid, I placed each for deposit in the United States Postal Service, this same day.

I declare, under penalty of perjury, according to the laws of the United States of America, that the foregoing is true and correct and that this service was made under the direction of a member of the Bar of this Court.

Executed this 14 day of December, 2007, San Diego, California.

Debra L. Barker
DEBRA L. BARKER

EXHIBIT B:

Answering Brief by the IRS

BRIEF INITIALED PAGE

ANSWERING BRIEF FOR RESPONDENT

In re: Toothacre v. Commissioner
Docket No. 26357-06"L"

Name	Date
Attorney: ______________________ KAREN NICHOLSON SOMMERS General Attorney (Small Business/Self-Employed)	________________
Reviewer: ______________________ JEFFREY A. SCHLEI Associate Area Counsel (Small Business/Self-Employed)	________________

UNITED STATES TAX COURT

RODNEY M. TOOTHACRE,)
)
Petitioner,)
)
v.) Docket No. 26357-06"L"
)
COMMISSIONER OF INTERNAL REVENUE,)
)
Respondent.)

ANSWERING BRIEF FOR RESPONDENT

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UNITED STATES TAX COURT

RODNEY M. TOOTHACRE,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 26357-06"L"
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent.	)	

ANSWERING BRIEF FOR RESPONDENT

PRELIMINARY STATEMENT

This proceeding is a lien action under I.R.C. § 6320 and I.R.C. § 6330 for the 1993 and 1994 tax years. On October 29, 2007, before the Honorable Mary Ann Cohen, in San Diego, California, the parties submitted this case fully stipulated under Rule 122. Petitioner timely filed his opening brief, and respondent's answering brief is due January 28, 2007. The evidence in this case consists of the pleadings and the Stipulation of Facts, with Exhibits 1-J through 17-J. In addition, petitioner recently moved to supplement the record with additional documents. The Court granted petitioner's motion, in part, on January 14, 2008.

Respondent will identify references to the Stipulation of Facts as SOF ___, and to the exhibits as ___-J or ___-P.

Respondent will identify references to Respondent's Requested Findings of Fact as RRFF ___.

QUESTIONS PRESENTED

I. Whether respondent's settlement officer correctly determined that (a) collection of the assessed liabilities for tax years 1993 and 1994 was not barred by the statute of limitations, (b) the liabilities for tax years 1993 and 1994 were not discharged in petitioner's bankruptcy, and (c) petitioner received timely notice of the filing of the Notice of Federal Tax Lien in issue.

II. Whether it was an abuse of discretion for respondent's settlement officer to determine that the filing of the Notice of Federal Tax Lien with respect to the tax years 1993 and 1994 was appropriate.

RESPONDENT'S REQUEST FOR FINDINGS OF FACT

To the extent that the Court chooses to treat the statements following the heading "STATEMENT OF FACTS" in petitioner's opening brief as requests for findings of fact, respondent objects in part, as follows:

First unnumbered paragraph. No objection to the requested finding that petitioner had a refinance escrow open; objection to the remainder of the paragraph on the grounds that it is vague, ambiguous, and not supported by the record.

Second unnumbered paragraph. First through fourth sentences. No objection. Fifth through seventh sentences. Respondent objects to the requested finding of fact on the grounds that it is vague, ambiguous, and not supported by the record. Eighth sentence. No objection except for lack of relevance to any material issue in this case.

Third unnumbered paragraph. First sentence. No objection. Second and third sentences. Respondent objects to the requested finding of fact on the grounds that it is vague, ambiguous, and not supported by the record.

Fourth unnumbered paragraph. No objection to the requested finding that Carmellino sent a letter dated December 13, 3005;

objection to the remainder of the paragraph on the grounds that it is vague, ambiguous, and not supported by the record.

Fifth unnumbered paragraph. First sentence. No objection to the requested finding that Carmellino sent a letter dated December 20, 3005; objection to the remainder of the sentence on the grounds that it is vague, ambiguous, and not supported by the record. Second sentence. No objection.

Sixth through eighth unnumbered paragraphs. No objection.

Ninth unnumbered paragraph (beginning with "On January 3, 2006"). Respondent objects to the requested finding of fact on the grounds that it is vague, ambiguous, not supported by the record, and not relevant to any material issue in this case.

Tenth through nineteenth unnumbered paragraphs. Respondent objects to the requested findings of fact on the grounds that they are vague, ambiguous, not supported by the record, and not relevant to any material issue in this case.

Respondent requests that the Court find the following facts:

1. At the time the petition was filed, petitioner resided in Poway, California. (**SOF 1.**)

2. On March 27, 1995, petitioner and his wife Marcia L.

Toothacre (who is now deceased) filed a joint federal income tax return for the tax year 1993 which reported tax due of $92,666.00. There were no prepayment credits, and no payment was made with the return. On May 1, 1995, respondent assessed the tax shown on the return, along with penalties of $20,849.85 for late filing of the return and $6,023.29 for failure to pay tax, and interest of $9,595.87. Payments and overpayment credits from other tax years of approximately $17,000.00 were applied to the 1993 tax year between 1997 and 2006, leaving a balance due on the account of $277,946.16 as of May 29, 2006. (**14-J**, pp. 1, 2).

3. On April 15, 1995, petitioner and Marcia L. Toothacre filed a joint federal income tax return for the tax year 1994 which reported tax due of $9,825.00. There were no prepayment credits, and no payment was made with the return. On June 5, 1995, respondent assessed the tax shown on the return, along with penalties of $506.20 for failure to make estimated tax payments and $98.25 for failure to pay tax, and interest of $128.23. A $600.00 overpayment credit from tax year 2000 was applied to the 1994 tax year in 2001, leaving a balance due on the account of $24,996.74 as of May 29, 2006. (**14-J**, pp. 3, 4).

4. On September 8, 1995, petitioner and Mrs. Toothacre

filed a chapter 7 bankruptcy petition (Case No. 95-0682-H7, U.S. Bankruptcy Court for the Southern District of California). On January 19, 1996, an order was issued in the bankruptcy case discharging petitioner and Mrs. Toothacre of their dischargeable debts. (**1-J**, p. 6, 7; **3-J**, 4th page, 9th page.)

5. On February 4, 1997, respondent filed a Notice of Federal Tax Lien with respect to the unpaid 1993 and 1994 liabilities, as Document No. 1997-0048509 in San Diego County, California (hereinafter "NFTL 02/04/97"). NFTL 02/04/97 included a statement that the last day for refiling the notice of lien was May 31, 2005, and July 5, 2005, for the tax years 1993 and 1994, respectively, and, that as of the day following the lien refiling date, NFTL 02/04/97 operated as a certificate of release of lien under I.R.C. § 6325(a) for the assessments listed. (**1-J**, p. 3.)

6. NFTL 02/04/97 was not timely refiled by respondent with respect to either tax year. Accordingly, NFTL 02/04/97 "self-released" on June 1, 2005, and July 6, 2005, for the tax years 1993 and 1994, respectively. In addition, on August 12, 2005, respondent filed a Certificate of Release of Lien with respect to the unpaid 1993 and 1994 liabilities. (**1-J**, pp. 4, 7-9.)

7. On April 6, 2005, petitioner submitted an Offer in Compromise to respondent with respect to tax years 1993 and 1994. On June 15, 2005, petitioner withdrew the Offer in Compromise. (**1-J**, p. 7; **10-J**; **11-J**; **14-J**.)

8. During 2005, respondent's Revenue Officer A. Martinez was assigned to petitioner's collection case for tax years 1993, 1994, 1995, 1996, 2003, and 2004. On or about October 18, 2005, Ms. Martinez determined the statute of limitations on collection of the assessments for tax years 1993 and 1994 had not expired, having been tolled by petitioner's bankruptcy case and by his offer in compromise. She determined that the federal tax liens with respect to tax years 1993 and 1994 had been erroneously released. On October 18, 2005, Ms. Martinez spoke to petitioner, and explained why the lien release was erroneous, and informed him that respondent would revoke the erroneous lien release and reinstate the federal tax lien. (**SOF 8**; **1-J**, p. 4; **8-J**, entry dated "ACT DT 10/18/2005"; **9-J**.)

9. On or about November 7, 2005, Ms. Martinez prepared a memorandum addressed to respondent's Lien Advisor Karen Buhrow, requesting a revocation of the release of lien and refiling of the Notice of Federal Tax Lien with respect to tax years 1993 and 1994. (**SOF 8**; **1-J**, p. 4; **9-J**.)

10. On December 2, 2005, Lien Advisor Buhrow made an entry in respondent's ICS collection case history with respect to petitioner, indicating that the revocation of the release of lien with respect to tax years 1993 and 1994 had been completed. (**SOF 8; 8-J**, entry dated "ACT DT 12/02/2005".)

11. On December 2, 2005, Revenue Officer Martinez spoke to Lien Advisor Buhrow concerning the refiling of the Notice of Federal Tax Lien with respect to tax years 1993 and 1994. Ms. Martinez and Ms. Buhrow agreed that Ms. Martinez would file a new Notice of Federal Tax Lien with respect to tax years 1993 and 1994. Ms. Martinez filed the new Notice of Federal Tax Lien in San Diego County, California, on December 5, 2005. (**SOF 8; 8-J**, entries dated "ACT DT 12/05/2005 and 12/06/2005".)

12. The Notice of Federal Tax Lien filed in San Diego County on December 5, 2005, with respect to tax years 1993 and 1994 was recorded as Document No. 2005-1042915. (**8-J**, entry dated "ACT DT 12/06/2005".)

13. Respondent sent petitioner a Letter 3172(DO) Notice of Federal Tax Lien Filing and Your Right To A Hearing, dated December 7, 2005, with respect to the filing of the Notice of Federal Tax Lien for tax years 1993 and 1994. (**SOF 3; 2-J.**)

14. Petitioner sent a Form 12153 Request for a Collection

Due Process Hearing (hereinafter "CDP request") with respect to the filing of the Notice of Federal Tax Lien for tax years 1993 and 1994, which was received by respondent on December 23, 2005. (**SOF 4; 3-J.**)

15. The CDP request was assigned to Settlement Officer Cynthia Chadwell, of Internal Revenue Service Office of Appeals, San Diego, California. (**SOF 5.**)

16. In his CDP request, petitioner raised the following issues: (a) his tax year 1993 and 1994 tax liabilities had been discharged in bankruptcy; (b) the statute of limitations on collection of the assessments for tax years 1993 and 1994 had expired; (c) the underlying statutory lien had been extinguished; and (d) he did not receive timely notice of the filing of the Notice of Federal Tax Lien. (**3-J.**)

17. In the CDP hearing, petitioner did not present any collection alternatives, and did not challenge the existence or amount of the liabilities for tax years 1993 or 1994. (**1-J; 3-J;** Entire record.)

18. In connection with the CDP hearing request, Ms. Chadwell reviewed Internal Revenue Service TXMODA transcripts, dated June 1, 2006, with respect to petitioner's income tax accounts for tax years 1993 and 1994. Ms. Chadwell verified

that the tax liabilities for tax years 1993 and 1994 had been properly assessed, that petitioner had been notified of the assessments, and that the assessments remained unpaid. Ms. Chadwell also reviewed Internal Revenue Service case history records. (**5-J, 6-J, 7-J, 8-J.**)

19. On November 22, 2006, respondent issued to petitioner a Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330 (hereinafter "Notice of Determination"), for tax years 1993 and 1994, advising petitioner that respondent's Appeals Office had sustained respondent's filing of the NFTL. (**SOF 2; 1-J.**)

20. In the Notice of Determination, respondent's Appeals Office determined that all legal and procedural requirements with respect to the NFTL filing had been followed, that the arguments raised by petitioner did not justify withdrawal of the NFTL, and that petitioner had offered no collection alternatives to the NFTL filing. (**1-J.**)

21. After this case was submitted for decision under Rule 122, petitioner provided additional evidence to respondent with respect to the revocation of the release of lien for tax years 1993 and 1994, which establishes that on December 16, 2005, at 11:26 a.m., respondent filed (a) a duplicate Notice of Federal

Tax Lien with respect to petitioner's income tax liabilities for tax years 1993 and 1994, and (b) a Revocation of Certificate of Release of Federal Tax Lien with respect to petitioner's income tax liabilities for tax years 1993 and 1994. (**20-P, 22-P.**)

22. After this case was submitted for decision under Rule 122, petitioner provided additional evidence to respondent with respect to the revocation of the release of lien for tax years 1993 and 1994, which establishes that on January 30, 2006, respondent mailed petitioner notice of the revocation of the release of federal tax lien with respect to petitioner's income tax liabilities for tax years 1993 and 1994. (**24-P.**)

ULTIMATE FINDINGS OF FACT

23. Petitioner's income tax liabilities for tax years 1993 and 1994 were not discharged in bankruptcy. (Entire record.)

24. The statute of limitations on collection of the assessments for petitioner's tax year 1993 and 1994 income tax liabilities had not expired on December 23, 2005, the date on which petitioner requested a CDP hearing with respect to the Notice of Federal Tax Lien Filing and Your Right To A Hearing for tax years 1993 and 1994. (Entire record.)

25. Petitioner received timely notice of the December 5, 2005, filing of the Notice of Federal Tax Lien for tax years 1993 and 1994. (Entire record.)

26. The federal tax liens with respect to petitioner's income tax liabilities for tax years 1993 and 1994 were released on June 1, 2005, and July 6, 2005, respectively. The liens were not reinstated until January 30, 2006, the date on which respondent mailed petitioner notice of the issuance of the Certificate of Revocation of Certificate of Federal Tax Lien with respect to petitioner's income tax liabilities for tax years 1993 and 1994. (Entire record.)

27. The December 5, 2005, filing of a Notice of Federal Tax Lien with respect to petitioner's income tax liabilities for

tax years 1993 and 1994 was improper, because there was no federal tax lien in existence for tax year 1993 during the period from June 1, 2005, to January 30, 2006, and, for tax year 1994, during the period from July 6, 2005, to January 30, 2006. (Entire record.)

28. The settlement officer properly determined that, as of the December 23, 2005, CDP hearing request by petitioner, the statute of limitations on collection of petitioner's income liabilities for tax years 1993 and 1994 had not expired. The settlement officer also properly determined that the liabilities had not been discharged in bankruptcy, and that petitioner had received timely notice of the filing of the Notice of Federal Tax Lien. (Entire record.)

29. The settlement officer's determination that the Notice of Federal Tax lien had been properly filed after reinstatement of the federal tax lien was incorrect as a matter of law. Accordingly, the settlement officer's decision to sustain the filing of the Notice of Federal Tax Lien was an abuse of discretion. (Entire record.)

POINTS RELIED UPON

In sustaining the filing of the Notice of Federal Tax Lien with respect to tax years 1993 and 1994, the settlement officer considered issues raised by petitioner: namely, that the statute of limitations on collection had expired, that the tax liabilities had been discharged in bankruptcy, and that petitioner had not been timely notified of the filing of the lien. The settlement officer properly concluded that petitioner's arguments were invalid as to these issues, and her determinations on these issues should be sustained.

The settlement officer verified that legal and procedural requirements for the assessment of the tax liabilities in question had been followed, and that petitioner owed the liabilities. Her determinations on these issues should be sustained.

The settlement officer noted that the federal tax lien for tax years 1993 and 1994 was erroneously released in mid-2005, but she failed to recognize that the statutory federal tax lien was not reinstated until January 30, 2006, when respondent gave notice of the revocation of the release of lien to petitioner. Accordingly, the December 5, 2005, filing of a Notice of Federal Tax Lien for tax years 1993 and 1994 was improper, and the settlement officer's decision to sustain the filing of the Notice of Federal Tax Lien was without sound basis in fact or law. The settlement officer's decision to uphold the notice of lien filing was an abuse of discretion and should not be sustained.

ARGUMENT

I. The settlement officer properly determined that the statute of limitations on collection of petitioner's income liabilities for tax years 1993 and 1994 had not expired, that the liabilities had not been discharged in bankruptcy, and that petitioner had received timely notice of the filing of the Notice of Federal Tax Lien.

A. The statute of limitations on collection has not expired.

Petitioner claims that the collection period of limitations expired before the CDP Notice was mailed to him on December 7, 2005 and therefore the underlying tax lien should be released.

The period of limitations for collection of assessed federal income taxes begins on the date taxes are assessed and ends 10 years thereafter. I.R.C. § 6502(a)(1). However, the 10-year collection period of limitations on federal income taxes also is suspended for the period of time that respondent is prevented from collecting taxes by reason of a pending bankruptcy proceeding, plus 6 months. I.R.C. § 6503(h)(2).

Under Bankruptcy Code § 362(a), the filing of a bankruptcy petition creates an automatic stay against collection by third parties (including respondent) of most types of claims that arose before the commencement of the bankruptcy proceeding (including federal income taxes) against a debtor in bankruptcy. The automatic stay remains in effect with regard to in rem actions against property of a debtor in bankruptcy until the property is no longer part of a bankruptcy estate. Bankruptcy Code § 362(c)(1). The automatic stay remains in effect and prevents other collection efforts against a debtor in bankruptcy until the related bankruptcy proceeding is closed, dismissed, or until a discharge order is issued or denied. Bankruptcy Code § 362(c)(2).

I.R.C. § 6503(h)(2) provides that the 10-year collection period of limitations on Federal income taxes is suspended for the period of time that respondent is prevented from collecting taxes by reason of a pending bankruptcy proceeding, plus 6 months. The automatic stay in a chapter 7 bankruptcy proceeding generally will not end until the issuance by the bankruptcy court of a discharge order. Therefore, the suspension of the collection period of limitations under section I.R.C. § 6503(h) will not end until issuance by the bankruptcy court of a discharge order, plus an additional 6 months. Richmond v. United States, 172 F.3d 1099, 1103 (9th Cir. 1999).

Petitioner's bankruptcy case was filed on September 8, 1995, and the discharge order was issued on January 19, 1996. (RRFF 4.) Accordingly, the bankruptcy suspended the running of the collection statute of limitations for 133 days (September 8, 1995, through January 19, 1996) plus an additional six months. I.R.C. § 6503(h)(2); see Severo v. Commissioner, 129 T.C. No. 17 (Nov. 15, 2007).

Petitioner submitted an Offer in Compromise to respondent with respect to tax years 1993 and 1994 on April 6, 2005, and withdrew the offer on June 15, 2005. (RRFF 7.) During the 70-day period the offer was pending, respondent was prohibited from levying on petitioner's property. I.R.C. § 6331(k)(1)(A). Accordingly, the running of the statute of limitations on collection was suspended for the period during which levy was prohibited. I.R.C. § 6331(i)(5).

The normal statute of limitations on collection of the assessed liability for tax year 1993 would have expired on May 1, 2005, 10 years after the assessment date of May 1, 1995. For tax year 1994, the 10-year statute of limitation on collection would have expired on June 5, 2005, 10 years after the assessment date of June 5, 1995. Due to petitioner's 1995 bankruptcy case, the running of the statute of limitations was suspended for 133 days plus 6 months; due to petitioner's offer in compromise, the running of the statute of limitations was suspended for an 70 days. Thus, the statute of limitations for tax year 1993 still had 203 days, plus six months, to run on May 1, 2005; and the statute of limitations for tax year 1994 still had 203 days, plus six months, to run on June 5, 2005. Accordingly, on December 23, 2005, when petitioner requested the CDP hearing, the statute remained open for both years. The 10-year collection period of limitations has remained suspended ever since December 23, 2005. Once this action is final, there will be approximately 5 months remaining, plus another 90 days, for tax year 1993 (6 months plus another 90 days for tax year 1994) before it expires. I.R.C. § 6320 (c) and I.R.C. § 6330(e)(1).

B. Petitioner's 1993 and 1994 tax years were not discharged in his September 8, 1995 bankruptcy case.

Under Bankruptcy Code § 523(a), not all debts may be discharged, and often a discharge order of the bankruptcy court will not state which particular debts are discharged and which are not discharged (see Bankruptcy Official Form 18, Discharge of Debtor). Generally, however, if a discharge order is issued by the bankruptcy court in a chapter 7 bankruptcy proceeding, a debt will be discharged unless it is excepted from discharge. Bankruptcy Code § 523.

Whether a liability of a debtor in bankruptcy to pay Federal income taxes is discharged by a chapter 7 bankruptcy court discharge order does not depend on whether the particular discharge order expressly states that the tax liability is discharged, but rather depends on whether the particular Federal income taxes owed to respondent are to be excepted from discharge under the provisions of the Bankruptcy Code. See Bankruptcy Code § 727(b); Woods v. Commissioner, T.C. Memo 2006-38.

Generally, under Bankruptcy Code § 523 (a)(1)(A) tax liabilities of a debtor in bankruptcy that qualify as priority claims under Bankruptcy Code § 507(a)(7) will be excepted from discharge and will remain liabilities of the debtor in bankruptcy after the bankruptcy proceeding is concluded. Bankruptcy Code § 523(a)(1)(A) provides as follows:

Section 523. Exceptions to discharge.

a) A discharge under section 727 * * * of this title does not discharge an individual debtor from any debt --

(1) for a tax * * *

(A) of the kind and for the periods specified in section * * * 507(a)(7) of this title, whether or not a claim for such tax was filed or allowed * * *

Under the cross-referenced Bankruptcy Code § 507(a)(7)(A)(i), federal income taxes are to be treated as priority claims (and therefore under Bankruptcy Code § 523(a)(1)(A) as excepted from discharge) where they relate to a tax year of a debtor in bankruptcy which ended on or before the date the related bankruptcy petition was filed and where the Federal income tax return for the year was due to be filed with respondent, with extensions, within the 3-year lookback period immediately before the filing of the bankruptcy petition.

Bankruptcy Code § 507(a)(7)(A)(i) provides as follows:

Section 507. Priorities.

a) The following expenses and claims have priority in the following order:

* * * * * * *

(7) Seventh, allowed unsecured claims of governmental units, only to the extent that such claims are for --

(A) a tax on or measured by income or gross receipts --

(i) for a taxable year ending on or before the date of the filing of the petition for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition * * *

Petitioner's 1993 and 1994 tax years ended before petitioner filed his bankruptcy petition on September 8, 1995, and petitioner's 1993 and 1994 federal income tax returns were due to be filed on April 15, 1994, and April 15, 1995, respectively--within the 3-year lookback period before September 8, 1995. Petitioner's outstanding 1993 and 1994 federal income taxes therefore qualified under Bankruptcy Code § 507(a)(7)(A)(i) as a priority claim in favor of respondent.

Accordingly, under Bankruptcy Code § 523 (a)(1)(A), petitioner's outstanding 1993 and 1994 federal income taxes were excepted from discharge (i.e., were not discharged) by the January 19, 1996, bankruptcy court discharge order that was issued in favor of petitioner. In re Smith v. United States, 109 Bankr. 243, 245 (Bankr. W.D. Ky. 1989), affd. 114 Bankr. 473 (W.D. Ky. 1989); cf. Young v. United States, 535 U.S. 43, 49, 122 S. Ct. 1036, 152 L. Ed. 2d 79 (2002) (involving a different question concerning the relationship between a chapter 13 bankruptcy proceeding and a subsequent chapter 7 bankruptcy proceeding and holding that the 3-year lookback period of Bankruptcy Code § 507(a)(7)(A)(i) was tolled during the chapter 13 proceeding).

The penalties assessed with respect to tax years 1993 and 1994 are also nondischargeable, pursuant to Bankruptcy Code § 523 (a)(7)(B) (non-pecuniary loss penalties payable to a governmental unit are nondischargeable, if they relate to a transaction or event occurring within 3 years before the date of the bankruptcy petition.)

C. Petitioner received timely notice of the December 5, 2005, Notice of Federal Tax Lien filing.

The Notice of Federal Tax Lien at issue in this case was filed on December 5, 2005. The Notice of Federal Tax Lien Filing and Your Right To A Hearing, on which this case was based, is dated December 7, 2005. At the CDP hearing, petitioner apparently argued that he did not received timely notice of the filing of the lien. The record demonstrates otherwise. Petitioner has raised no argument with respect to this matter in his opening brief, and may be deemed to have abandoned the issue. Petzoldt v. Commissioner, 92 T.C. 661, 683-687 (1989).

II. The settlement officer's determination that the Notice of Federal Tax lien had been properly filed after reinstatement of the federal tax lien was incorrect as a matter of law, and was accordingly an abuse of discretion.

The administrative record in this case demonstrates that respondent's employees misunderstood the effect of a certificate of release of lien under I.R.C. § 6325(f)(1), and therefore did not follow the proper procedures for revoking an erroneous release of lien and reinstating the federal tax lien under I.R.C. § 6325(f)(2).

An erroneous release of lien does not affect the underlying liability for tax if the statute of limitations on collection is still open. Baker v. Commissioner, 24 T.C. 1021, 1025 (1955); Miller v. Commissioner, 23 T.C. 565, 569 (1954), aff'd., 231 F.2d 8 (5th Cir. 1956). Petitioner remains liable to pay the 1993 and 1994 liabilities until the expiration of the collection statute of limitations, regardless of whether or when the federal tax lien was in existence. Nevertheless, a filed release of lien is conclusive evidence that the underlying statutory lien is extinguished; the statutory lien does not exist until/unless the release was revoked and the lien was reinstated. I.R.C. § 6325(f)(1); Treas. Reg.

§ 301.6325-1(f)(1)(i). I.R.C. § 6325(f)(2) specifies that the statutory lien is reinstated on the date when notice of the revocation of release sent to the taxpayer.

In this case, Revenue Officer Martinez requested approval for revocation of the erroneous release of lien through Lien Advisor Buhrow. (RRFF 9, 10, 11.) The collection case history file reflects these employees' apparent belief that after a certificate of revocation of the erroneously released lien had been approved and prepared, a new Notice of Federal Tax Lien could be filed immediately. (RRFF 10, 11.)

Settlement Officer Chadwell at one point apparently spotted the issue of whether notice of revocation had been provided to petitioner, as noted in an entry in her case history record. (Ex. 5-J.) However, she did not pursue this issue in the Notice of Determination, focusing instead on the matters raised by petitioner of the statute of limitations, bankruptcy discharge, and conclusiveness of the erroneous lien releases with respect to petitioner's continuing liability for tax for tax years 1993 and 1994. And, as demonstrated above, her determinations with respect to those matters were correct.

Nevertheless, based upon the information provided by petitioner after this case was submitted for decision, respondent now concedes that the federal tax liens with respect to petitioner's income tax liabilities for tax years 1993 and 1994 were not reinstated until January 30, 2006, the date on which respondent mailed petitioner notice of the issuance of the Certificate of Revocation of Certificate of Federal Tax Lien with respect to tax years 1993 and 1994. I.R.C. § 6325(f)(2). Thus, because of the previous lien releases for tax years 1993 and 1994, there were no federal tax liens in existence with respect to tax years 1993 or 1994 at the time the Notice of Federal Tax Lien was filed on December 5, 2005. The Notice of Federal Tax Lien was thus filed approximately 8 weeks prematurely. Settlement Officer Chadwell's determination to uphold the lien filing was incorrect as a matter of law. It was therefore an abuse of discretion, and should not be sustained.

Respondent has now filed a Notice of Withdrawal, pursuant to I.R.C. § 6323(j), with respect to the premature Notice of Federal Tax Lien at issue in this case, filed on December 5, 2005.[1] Because the statutory federal tax liens for the tax years 1993 and 1994 were reinstated on January 30, 2006, and because the federal tax liens will remain in existence until the expiration of the statutes of limitation on collection for tax years 1993 and 1994, respondent in the future may file a new Notice of Federal Tax Lien with respect to the tax years 1993 and 1994. Accordingly, it is respondent's position that the recent withdrawal of the prematurely filed Notice of Federal Tax Lien at issue in the case does not render the case moot.

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[1] Respondent has also filed a Notice of Withdrawal with respect to the duplicate Notice of Federal Tax Lien for tax years 1993 and 1994, which had been filed on December 16, 2005.

III. No prohibited ex parte communication took place in this case.

Petitioner's opening brief alludes to several entries in the administrative record, which he asserts were prohibited ex parte communications.

Section 1001 (a)(4) of the Internal Revenue Restructuring and Reform Act of 1998, Pub. L. No. 1005-206, 112 Stat. 685 (RRA 98) required that the Commissioner's plan to reorganize the Service ensure an independent Appeals function, including the prohibition in the plan of ex parte communications between Appeals Officers or Settlement Officers and other Service employees to the extent that such communications appear to compromise the independence of Appeals. To fulfill the Congressional mandate to ensure an independent Appeals function, the Service issued Rev. Proc. 2000-43, 2000-2 C.B. 404. Rev.

Proc. 2000-43, sec. 3, Q&A-1, provides the following general description of the prohibition on ex parte communications:

> For the purposes of this revenue procedure, ex parte communications are communications that take place between Appeals and another Service function without the participation of the taxpayer or the taxpayer's representative (taxpayer/representative). While the legislation refers to "appeals officers," the overall intent of the ex parte provision is to ensure the independence of the entire Appeals organization. Ex parte communications between any Appeals employee, e.g., Appeals Officers, Appeals Team Case Leaders, Appeals Tax Computation Specialists, and employees of other Internal Revenue Service offices are prohibited to the extent that such communications appear to compromise the independence of Appeals.

Rev. Proc. 2000-43, sec. 3, Q&A-1, 2000-2 C.B. at 405.

Rev. Proc. 2000-43 does provide that the prohibition against ex-parte communications applies when Appeals considers a case which originated in the Collection function, including collection due process (CDP) appeals and offers in compromise. Specifically, an Appeals officer may not engage in ex parte discussions with collection employees regarding the strengths and weaknesses of the issues of a case that would appear to compromise the Appeals officer's independence and must give the taxpayer an opportunity to participate in any discussions concerning matters that are not ministerial, administrative, or procedural in nature. Rev. Proc. 2000-43, sec. 3, Q&A-6, 2000-2 C.B. at 406.

There were no prohibited ex parte communications in this case. First, the majority of the communications alluded to by petitioner in pages 19 through 22 of his opening brief were by Revenue Officer Martinez, prior to the date the CDP hearing case was in existence. No Appeals employee was involved in those communications.

Second, the only communication referred to by petitioner which involved an Appeals employee was in Ms. Chadwell's history notation that she had been informed that petitioner "had a damage suit pending with respect to the lien filing". (Petitioner's Opening Brief, p. 21.) Actually, petitioner had a damage claim, not a suit, pending with respect to, inter alia, the lien filing at issue. Petitioner provided a complete copy of his damage claim to Ms. Chadwell as part of his CDP hearing request. (Ex. 17-J.) The communication Ms. Chadwell received was simply a reference to the fact the petitioner had already raised a dispute with the Internal Revenue Service concerning the same Notice of Federal Tax Lien filing that was the subject of the CDP request. This communication contained no discussion of the strength or weaknesses of Petitioner's case. Petitioner does not explain how a mention of the fact of his damage claim could possibly rise to the sort of prohibited ex parte communication envisioned in the statute. It is clear from the record that no prohibited ex parte communication took place.

CONCLUSION

It follows that the determination of the Commissioner of Internal Revenue with respect to the statute of limitations on collection and with respect to the effect of petitioner's 1996 bankruptcy discharge should be sustained. The determination of the Commissioner of Internal Revenue with respect to the filing of the Notice of Federal Tax Lien at issue in this case should not be sustained.

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Reply Brief by Mr. Toothacre

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UNITED STATES TAX COURT

RODNEY M. TOOTHACRE, Petitioner, COMMISSIONER OF INTERNAL REVENUE Respondent.	Docket No. 26357-06"L"

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CHIEF COUNSEL
2008 MAR -5 PM 2:29

PETITIONER RODNEY M. TOOTHACRE'S REPLY BRIEF

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PETITIONER RODNEY M. TOOTHACRE'S REPLY BRIEF

I. INTRODUCTION

This case arises out of a tax dispute between Petitioner RODNEY M. TOOTHACRE and the INTERNAL REVENUE SERVICE (IRS). The IRS has filed various liens against Petitioner's property wrongfully and maliciously resulting in both financial damages and emotional damages as described more fully herein.

First, Respondent's Answering Brief contains several meritless objections to Petitioner's Request For Findings of Fact. Those objections allege grounds that the facts are vague, ambiguous, irrelevant and not supported by the record. A cursory reading of the facts objected to will demonstrate that the facts are not vague or ambiguous in any respect. Further, they are clearly related to the subject action and are supported by the record. Petitioner requests that Respondent's objections be summarily overruled.

Second, Respondent cannot and has not demonstrated that the assessment date for CSED purposes conclusively establishes the taxes in question are collectible.

Third, Respondent continues to erroneously assert there is a six month add on period at the end of the three-year look back period. The United States Supreme Court has held otherwise. (*Young v. United States*, 535 U.S. 43; S. Ct. 1036, 152 L. Ed. 2d 79 (2002).)

Fourth, Respondent has not overcome the fact that the Notice of Federal Tax Lien expired by its own terms.

Fifth, Respondent now admits that there were ex parte communications, but follows with the self-serving statement that the "communication contained no discussion of the strength or weaknesses of Petitioner's case." (RB p. 30) Having established that there were ex parte communications, how can Petitioner ever be assured that he is receiving a fair and independent appeal of this matter?

II. ARGUMENT

A. Notwithstanding Respondent's Assertions that the Assessment Date for CSFD Purposes Conclusively Establishes that the Taxes Are No Longer Collectible.

Nothing in Respondent's brief refutes the fact that 1993 and 1994 returns were self assessing tax returns and that the assessment date was the date that the returns were received by the IRS. Ms. Chadwell, the AO, in her Case Activity Record Print, on page one, states: ***"93 is a late filed joint self assessed return."*** (first page of Case Activity Record Print)

Furthermore, nothing in Respondent's brief counters the findings of Victoria Osborn, Certified Fraud Examiner, Public Accountant and Forensic Accountant, that the 1993 and 1994 taxes were uncollectible. Her letter is attached to the Stipulation of Facts as part of Exhibit #15 and made a part hereof as though set forth in full. In that letter Ms. Osborn states on page 2:

> The master file is consistent with Ms. Chadwell's statement that the "*assessment dates for the 1993 and 1994 years are May 1, 1995 and June 5, 1995.*" However the running of the statute of limitations for self assessed returns begins with the "return received date" which is March 27, 1995 (1993) and April 15, (1994) and not the assessment date. See 26 *USC* 6501.

Ms. Chadwell, the AO, in her Case Activity Record Print on the last page in the entry dated 9/22/2005 refers to Ms. Osborn's August 17, 2006 letter stating:

> On second review of letter from TPS Accountant determined it was premature to close CDP without addressing issues raised regarding statute. CPA quoted IRC on what date is used for calc of SOL **but I don't believe it.** (emphasis added)(impartiality?)

No one from the IRS ever answered the question raised regarding the collections statute and neither does Respondent's brief.

Petitioner's expert forensic accountant concluded that the Statute of Limitations begins to run when the tax return, which is self assessing, is filed with the IRS. The Internal Revenue Manual (IRM) provides in part as follows:

> **4.7.3.3 (07-31-2000)**
>
> **Approval Authority**
>
> 3. Statute of limitation **dates are created when the tax return is filed** with a campus. This date is created on the Master File and is the date created on ERCS

> from AIMS. Generally there are three reasons a statute wold be updated on the ERCS system. (emphasis added)

Section 6151(a) of the Internal Revenue Code, 26 U.S.C. 6151, provides in relevant part:

> Except as otherwise provided in this subchapter, when a return of tax is required under this title or regulations, the person required to make such return shall, without assessment or notice and demand from the Secretary, pay such tax to the internal revenue officer with whom the return is filed, and shall pay such tax at the time and place fixed for filing the return (determined without regard to any extension of time for filing the return).

The Internal Revenue Service has consistently taken the position that the Date of Assessment of the 1993 taxes was 5/31/95 and that the Date of Assessment of the 1994 taxes was 06/05/95. Contrary to the IRS position, Petitioner was furnished by the IRS an Internal Revenue Document entitled **490 Activity Summary -** [redacted] Fed - [redacted] Rodney M & Marcia L Toothacre 1040 Tax Period: 1993/12. A true, correct and accurate copy of that document is attached as Exhibit #5 to Exhibit #3 of the Stipulation of Facts and made a part hereof as though set forth in full. A review of that document reveals that at two different places under date of **4/15/1994,** it is stated that the return is filed ***and the tax is assessed***. (emphasis added). Ms. Chadwell, in her Case Activity Record Print, on the top of page two disingenuously states:

> Transcript TP provided showing assmt date for 1993 as 4/15/94 is not an IRS Transcript. Bottom shows copyright decision Modeling, Inc. is a DMI third party vendor software program. This is not an IRS transcript containing information on the account from IDRS.

Ms. Chadwell admits that the IRS furnished this document to petitioner. In fact on page 52 of Exhibit #8 to The Stipulation of Facts, Revenue Officer Martinez states:

> RECEIVED ANOTHER FAXED LETTER FROM MR. CARMELLINO REQUESTING A CALL BACK TO DISCUSS THE LEVY PROCEEDS RECEIVED FROM SSA WHICH HAVE BEEN APPLIED TO THE Tps 9312 TAXES WHICH ACCORDING TO THE TP AND MR. CARMELLINO ARE UNCOLLECTIBLE. THE TP PROVIDED MR. CARMELLINO WITH A **COPY OF THE 490 ACTIVITY SUMMARY, THE TP RECEIVED FROM CINCINNATI SHOWING THE ASSESSMENT DATE FOR 1993 WAS 04/04/94.** MR. CARMELLINO IS REQUESTING A CALL BACK TO DISCUSS THE LEVY AMOUNTS TAKEN AND TO MAKE ARRANGEMENTS FOR THE TPs REFINANCE ESCROW TO CLOSE WITHOUT FURTHER INTERFERENCE FROM THE IRS. (emphasis added)

This IRS document furnished to the Petitioner by the Internal Revenue Service is an

admission and a declaration against interest. As a matter of fact, Petitioner has discovered that the document in question is an attachment to a document sent to Petitioner and his wife by the IRS on or about July 18, 2005: "**Urgent!! We intend to levy on certain assets. Please respond NOW** The law requires that you pay your tax at the time you file your return." The notice is dated July 18, 2005 and was issued by the Internal Revenue Service in Ogden, UT 84201-0030. That notice was served on Petitioner with an attachment Notice 1212 and a document concerning Penalty and Interest (2 sided) and the document entitled **Activity Summary.** The total amount of $264,174.71 on the notice coincides with the figure of $264,174.71 on the Activity Summary Sheet. The amount of interest on the notice of $17,603.22 is identical to the amount of interest on the Activity Summary Sheet of $17,603.22. In reviewing the Activity Summary Sheet, it is obvious that the IRS is attempting to charge interest and penalties from a date which precedes by more than one year the date they **now** claim is the date of assessment. The Activity Sheet states: "4/14/94 150 Return Filed & Assessment of Tax 92,666.00" A copy of the entire document served on Petitioner is marked Exhibit # 18 to the to the Administrative Record and made a part hereof as though set forth here in full.

A review of Exhibit #s 10 and 11 to The Stipulation of Facts reveals that Exhibit 10-J is a copy of the Internal Revenue Service Certificate of Assessments, Payments, and other Specified Matters dated June 20, 2006 with respect to Petitioner's income tax account for the tax year 1994 and Exhibit 11-J is s a copy of the Internal Revenue Service Certificate of Assessments, Payments, and other Specified Matters, dated June 20, 2006, with respect to Petitioner's income tax account for the tax year 1993. Exhibit # 11-J clearly states:

"03-27-1995 RETURN FILED & TAX ASSESSED" (emphasis added)

Exhibit 10-J clearly states:

"04-15-1995 RETURN FILED AND TAX ASSESSED" (emphasis added)

///
///
///

Each of these exhibits bearing the date of August 8, 2005 state:

"FEDERAL TAX LIEN RELEASED."

Also Exhibit 6, which is described in the Stipulation of Facts as "a copy of the Case Activity Records (case notes) maintained by Settlement Officer Chadwell in connection with her consideration of petitioner's CDP request shows that the (ASED) Assessment Statute Ending Date is 03271998 which coincides exactly with the dates reflected on the document that is claimed not to be an IRS document. The beginning date for the CSED must necessarily be the same as the beginning date of the CSED.

B. Ignoring Directions from the IRS Office of Chief Counsel Not to Rely on the Additional 6 Month Tolling Period of IRC § 6503(h), the Supreme Court Holding in Young v. United States, 122 S.Ct. 1036 (2002), Respondents Erroneously Continue to Argue that § 6503(h) adds an Additional Six Months to the Statute of Limitations

The United States Supreme Court in *Young v. United States*, 122 S.Ct. 1036 (2002), held that the three-year lookback period of Bankruptcy Code § 507(a)(8)(A)(1) is a limitations period subject to equitable tolling. Equitable tolling automatically applies and is appropriate whenever the Internal Revenue Service has been prevented by reason of bankruptcy from collecting its claim., regardless of whether the bankruptcy petition was filed in good faith. Therefore, in accordance with the *Young* holding, the lookback period of Bankruptcy Code § 507 is tolled during the pendency of a prior bankruptcy petition. Further, the automatic tolling rule adopted in *Young* determines the priority of dischargeability of any tax debt unless a court has issued a final order on the priority or dischargeability of the debt and all applicable appeal periods have expired.

Before *Young*, certain circuits held that the three-year lookback period was tolled during the period the Service was prohibited from collecting the tax by reason of the prior bankruptcy case, and, in reliance on Bankruptcy Code § 108(c), for the addition six months provided in I.R.C. § 6503(h); (See e.g., *In re West*, 5 F.3d 423 (9th Cir. 1993), *cert denied*, 511 U.S. 1061 (1994); *In re Montoya*, 985 F.2d 554 (7th Cir. 1992).

In light of the rationale in *Young*, the three-year lookback period of Bankruptcy Code §

507(a)(8)(A)(1) should not be computed by including an additional six months, based on I.R.C. § 6503(h).

In fact, Respondents acknowledged that in light of *Young*, the six month add-on from I.R.C. § 6503(h) should not be considered in computing the statute of limitations which is set forth in Bankruptcy Code § 507. (Exhibit 8 to the Stipulated Record and made a part hereof)

Further, with respect to the running of the statute of limitations, the ICS HISTORY TRANSCRIPT, at page 65, dated Thursday, June 1, 2006 contains the following entry by RO Martinez:

> Input the TC 520 (02-24-1995) and TC 521 (08-24-1995). These will take a couple of cycles to post. Need to discuss the issue the TP brought up about IRS not being allowed to add 6 months to the CSED. POA states Young v. United States, 122 S.Ct. 1036 and Notice CC-2002-023 issued by the Office of Chief Counsel. Spoke with BK Advisor Johnson-the Young case does not address the extension on the CSED. Briefly- it involves a lookback period for determining dischargability. **Advisor Johnson also indicated that Laguna Niguel counsel does not allow the 6 month extension on every BK filed by a TP and also does not allow for an over-lapping of extension due to an OIC filing.** Left not for Advisor Tubo for assistance on computing any extension due to the OIC. (Emphasis added)

The ICS HISTORY TRANSCRIPT, Exhibit # 8 to the Stipulated Record at page 56 contains the following entries by RO Martinez:

> ACT DT: 01/09/2006 FOR 9212 -9412: contact: corr. Created id: 27063105 General History.
>
> RECEIVED VIA FAX, DTD 01/05/06, A FOIA REQUEST FROM THE TP ADDRESSED TO DISCLOSURE OFFICER, FSC.
>
> **DUE TO THE STATUTE DATE OF 2006 FOR 9312 -9412, I HAVE DETERMINED TO BEGIN A SUIT TO REDUCE THE CLAIM TO JUDGMENT.** (Emphasis added)
>
> ILL SEND A SECURED EMAIL MESSAGE TO PALS EMPEE ANITA CHANDLER REQUESTING AN APPRAISAL REPORT FOR THE TPS property.

As additional evidence that even the IRS knew that the statute of limitations had run, a review of the Record will reveal that no such "suit to reduce the claim to judgment" was ever instituted.

Thus, Respondents' reliance upon *Richmond v. United States*, 172 F.3d 1099, 1103 (9th Cir. 1999) is misplaced. First and foremost because it was decided prior to *Young* and therefore its holding has been seriously undermined and eroded by the United States Supreme Court decision in *Young*. Second, the *Richmond* court discusses an additional 60 day period and nowhere makes mention of the six month period for which respondents cite the case.

Nor should the Court follow *Severo v. Commissioner*, 129 T.C. No. 17 (Nov. 15, 2007) as that decision is in conflict with the United States Supreme Court's decision in *Young* and is otherwise wrongly decided.

C. Respondent Has Not and Cannot Overcome the Fact that the Notice of Federal Tax Lien Expired by its Own Terms

The original Notice of Federal Tax Lien, dated January 30, 1997, and recorded in the records of the San Diego County Recorder's Office on February 4, 1997, contains, on its face, the following information. (See Exhibit #2 of Exhibit #3 of the Stipulation of facts.)

> **IMPORTANT RELEASE INFORMATION:** For each assessment listed below, unless a notice of the lien is refiled by the date given in column (e), this notice shall, the day following such date, operate as a certificate of release as defined in IRC 6325(a).

Accordingly, the Notices of Federal Tax Lien on, May 31, 2005 and July 5, 2005, became Certificates of Release of Federal Tax Liens and released the liens claimed. A true, correct and accurate copy of the original Notice of Federal Tax Lien is attached to the Stipulation of Facts, as Exhibit #2 to Exhibit #3 and made a part hereof as though set forth in full.

Alvin S. Brown, tax attorney, formerly with the Office of the Chief Counsel of the Internal Revenue Service, in an article entitled Tax Regs in Plain English - IRS Restructuring and Reform Act of 1998 Section 3461, Procedures for Extension of Statute of Limitations by Agreement, states:

> **Section 3461**
> **A. Provision(s) covered:** R.R.A. §§ 3461. Procedures Relating to Extensions of Statute of Limitations By Agreement. I.R.C. §§§§ 6501(c) and 6502(a).
>
> **B. Background:** Section 6501 of the Internal Revenue Code generally provides that the Service has three years from the date a return is filed to assess additional taxes. Section 6502 generally provides that the Service has ten years from the date of assessment to collect the tax. Prior to the expiration of the limitations period provided by these provisions, the law provided that the taxpayer and the Service could agree in writing to extend the statute of limitations. Congress believed that many taxpayers were not being informed of their rights to refuse to extend the statute of limitations on assessment or to limit the scope of any such extension. In addition,

Congress believed that all taxes should be collected within the 10 year statute and that the statute should not be extended.

C. Change(s): The authority to extend the collection statute of limitations by agreement ends on December 31, 1999. **Any extension of the collection statute already in effect on December 31, 1999, will expire on December 31, 2002.** An exception to this section is provided for extensions related to installment agreements. An extension of the collection statute entered into in conjunction with the acceptance of an installment agreement should be for the period necessary to satisfy the tax liability via the agreement. The legislation provides that the period of limitations for extensions related to installment agreements will expire 90 days after the end of the extension period. (emphasis added)

D. Respondent Cannot Overcome the Fact that the IRS Released the Liens Rendering the Taxes uncollectible

The Internal Revenue Service's attempt to revoke previously released liens was and is invalid. In addition to the fact that the lien(s) expired by its (their) own terms, there was also a Certificate of Release of Federal Tax Liens, voluntary and unsolicited, issued by the Internal Revenue Service on August 8, 2005. That Certificate of Release of Tax Lien was signed by the Director, Payment Compliance. A true, accurate and correct copy of that Certificate of Release of Federal Tax Lien is attached to Exhibit #3 to the Stipulation of Facts (Request for CDP Hearing) marked Exhibit #3 to that document and made a part hereof as though set forth in full. Internal Revenue Code §6325 (f) provides in part as follows:

Except as provided in paragraphs (2) and (3), if a certificate is issued pursuant to this section by the Secretary and is filed in the same office as the notice of lien to which it relates (if such notice of lien has been filed) such certificate shall have the following effect:

A) in the case of a certificate of release, such certificate shall be conclusive that the lien referred to in such certificate is extinguished; (emphasis added)

Petitioner's expert Forensic Accountant, Ms. Osborn, in her letter dated August 12, 2006, Exhibit #15 to the Stipulation of Facts, on page 2 states:

Issue #3: The lien was released, the lien refiling date had passed, and you were not given timely notice of the lien filing.

The master file accounts (printed on January 13, 2006) indicate a collection statute expiration date (CSED) of April 15, 2008 (1993) and January 11, 2008 (1994.)

The CSED has been **sanitized** from the literal transcript printed on 8-3-2006 and the IMF MCC TRANSCRIPT-SPECIFIC printed on May 11, 2006 you received from

> the IRS Disclosure office. This information is critical to your issues.
>
> These master file transcripts also contain the appropriate litigation indicator for the bankruptcy petition and its discharge and the subsequent offer in compromise described in Ms. Chadwell's letter of July 17, 2006. However, following all of the above information **a voluntary decision was made to release the Federal tax liens. It is important to know that these liens did not "self release" and are not eligible for reinstatement.** (emphasis added)
>
> **The transactions in the master file accounts for Form 1040 for tax periods 1993 and 1994 and Form 941 for tax period ending December 31, 1991 are consistent with a decision that the liability assessed together with all interest and penalties have become legally unenforceable.** *See 26 USC 6325(A)(1).* Ms. Chadwell's letters dated July 17, 2006 and August 3, 2006 do not identify a calculated collection statute expiration date even though she alleges the statute was open when you submitted your request for a collection due process hearing. (emphasis added)

In her Case Activity Record Print Ms. Chadwell states on the second page:

> 3. Lien was released and the IRS issued a Certificate of Release. **The TP was not given timely notice of the lien filing.** The NFTL on the 1993 and 1994 years was not refiled timely so the a (sic) certificate of release of the NFTL was erroneously issued. IRC 6325(f)(2) gives the IRS authority to revoke the release and reinstate the lien. A new lien was filed under IRC 6323(f) so that the reinstated lien will be valid against any lien or interest in 6323(a). ***Per IRM new lien has to be filed after the notice of revocation is mailed to the TP and recorded.* The effective date of reinstatement is the date the IRS mails the notice of revocation to the TP but not before the date the notice is filed at the SDCR. *I will need a copy of the notice of revocation.* Per ALS the new lien was recorded (sic) 12/05/05 with REC #2005-1042915. *Hopefully the notice of revocation was recorded and mailed to the TP before this date.* ALS shows 12/7/05 as 3172 date yet copy of 3172 shows 12/13/05. The difference may be due to fact RO manually filed lien. Also noted that lien filing date on notice is given as 12/06/05 when ALS and ICS shows the actual recording date to be 12/5/05. 5 business days after recording date is 12/12/05. IRC 6320(a)(2)(c)** Thus it can be argued that notice was issued one day late. However as far as I am concerned this is an administrative error that does not invalidate the NFTL. Based on wording in TPS appeal he claims that he was not notified with 5 business (sic).(emphasis added)

As a matter of fact the **Notice of Revocation was not** recorded and mailed to the TP before August 5, 2005. On **February 2, 2006**, Petitioner received, in his residential mail box, an envelope which was "franked" **January 30, 2006** in Cincinnati, Ohio. In that envelope was a Revocation of Certificate of Release of Federal Tax Lien. That document appears to have been prepared and signed at Laguna Niguel, California, on **December 1, 2005.** The receipt of the envelope by Petitioner was witnessed on **February 2, 2006**, by Jane T. Schiffmann in handwriting on the envelope. The Revocation of Certificate of Release of Federal Tax Lien received by Petitioner on **February 2, 2006** has **no** recording information. The document, envelope and a declaration by Ms. Schiffmann are attached to the Augmentation to the Administrative Record as Exhibit # 24 and made a part hereof as though set forth in full. For some unknown reason ,it took the Internal Revenue Service from December 1, 2005 until February 2, 2006 to notify Petitioner that this action was being taken. The Notice was very late, thus the revocation was invalid as a matter of law.

Further evidence of the fact that the subject Notices of Tax Liens had expired, both by their own terms by self releasing, and also by voluntary act of the IRS, are two documents which were issued by the Lien Unit Manager of the Internal Revenue Service. Both of these documents are intended to be "Beneficiary Statements" or "Pay Off Notices" to be placed in Petitioner's refinance escrow.

The first of the documents is dated August 5, 2005, and was addressed to Fidelity National Title Company c/o Natalie Dorsi at 5060 Shorea Place, Ste. 130, San Diego, CA 92122. Ms. Dorsi was/is the escrow officer handling Petitioner's refinance escrow. That document purports to reflect **all** tax liens filed in San Diego County, CA affecting Petitioner's residence and listed the tax liabilities for which there were filed liens. There is no mention of a lien for either tax year 1993 or tax year 1994. The total payoff figure set forth in the August 5th document was $147,528.16. The second document is dated September 3, 2005, also issued by the Lien Unit Manager of the IRS and addressed to Rodney M & Marcia L Toothacre at the residence address. This document also was intended to be a beneficiary statement and it reflects a payoff figure of $90,504.31. The reduction from the previous pay off figure is accounted for by the fact that liens against the partnership TOOTHACRE & PEDERSON had been removed, both by self releasing and by action of the IRS in issuing Certificates of Release of Liens.

The second document specifically states that the taxes for tax years 1993 and 1994 had been assessed, "but liens have not been filed". True and correct copies of both of these documents are attached to the Augmentation to the Administrative Record as Exhibit # 24 and made a part hereof as though set forth in full. These documents clearly establish that as far as the Lien Unit of the IRS was concerned, in August and September of 2005, there were **no valid liens concerning tax years 1993 and 1994.**

Presented herewith as Exhibit #s 20, 21, and 22 to the Augmentation to the Administrative Record are copies of three documents which were certified by the San Diego County Recorder all of which by this reference are made a part hereof as though set forth in full.

The first is Exhibit #20 which consists of two pages and is a Notice of Federal Tax Lien. The Notice indicates that it was prepared and signed at Laguna Niguel, California on the 2nd day of December, 2005. It is signed by A. Martinez, the Revenue Officer. The recording information indicates that this document was recorded with the San Diego County Recorders Office on December 5, 2005 at 8:19 AM. This is the document that Ms. Chadwell is referring to above "Per ALS the new lien was recorded (sic) 12/05/05 with REC #2005-1042915".

The second document is Exhibit # 21 which is a copy of a certified copy of a Notice of Federal Tax Lien which appears to have been prepared and signed at Laguna Niguel, California on the 2nd day of December, 2005. This Notice is signed by Susan A. Hansen for A. Martinez. It covers the exact same information as the previous notice concerning the tax years, taxpayers etc, but the forms are different and the second one bears recording information indicating it was recorded at the County Recorder's Office on **December 16, 2005** at 11:26 AM.

The third document included in Exhibit #21 to the Augmentation to the Administrative Record is a copy of a certified copy of a Revocation of Certificate of Release of Federal Tax Lien which appears to have been prepared and signed at Laguna Niguel, California on the 1st day of December, 2005, by Susan A. Hansen, Director, Campus Compliance Operations. This Revocation of Certificate of Release of Federal Tax Lien bears recording information that it was recorded on **December 16, 2005** at 11:26 AM. The Revocation of Certificate of Release of Federal Tax Lien which Taxpayer received on February 2, 2006, in an envelope which bears the franking date of January 30, 2006, is different from the Certificate which was actually recorded. Ms. Chadwell stated:

Per IRM new lien has to be filed **after** the notice of revocation is mailed to the TP and recorded. The effective date of reinstatement is the date the IRS mails the notice of revocation to the TP but not before the date the notice is filed at the SDCR. I will need a copy of the notice of revocation Per ALS the new lien was recorded (sic) 12/05/05 with REC #2005-1042915. **Hopefully** the notice of revocation was recorded and mailed to the TP before this date" (emphasis added)(impartiality?)

The Internal Revenue Manual provides as follows:

5.12.3.26 (09-07-2006)

Filing of Revocation Certificates and Notices

All certificates and notices will be filed in the same office where the original filing took place, unless the state has since redesignated its filing office for the specific type of property. The Uniform Federal Lien Act of the state should be checked to confirm where to file the certificate or notice.

Expenses related to the filing or recording of certificates will be borne by the government.

In the event that these certificates and notices may not be filed in the office designated by State law, they are to be filed in the office of the clerk of the United States district court for the judicial district in the State office where the NFTL is filed.

When filing a Certificate of Revocation and a new Notice of Federal Tax Lien, documents must be recorded in the proper order to be valid. The Certificate of Revocation must be recorded prior to the new Notice of Federal Tax Lien. (emphasis added)

5.12.3.23 (09-07-2006)

Revocation of Certificate of Release or Nonattachment

IRC §§ 6325(f)(2) provides for a revocation of a certificate of release or non attachment and the reinstatement of the NFTL to which the certificate relates.

A certificate of revocation may be issued when it has been determined that a release of FTL or a certificate of nonattachment was issued:

erroneously, improvidently, or in connection with a collateral agreement entered into in connection with a compromise under IRC §§ 7122 which has been breached, and if the period of limitation on collection after assessment has not expired.
Issue a Certificate of Revocation to revoke a self-releasing NFTL in those instances when new NFTL has been filed late.

Use Form 12474, Revocation of Certificate of Release of Federal Tax Lien to revoke the release when the lien was not self-releasing.

Use Form 12474-A, Revocation of Certificate of Release of Federal Tax Lien to revoke a lien that self-released.

A new Notice of Federal Tax Lien should be filed to protect the priority of the lien after the Certificate of Revocation is filed. See IRM 5.12.3.25.

When revocation is required, a request will be sent to Advisory to have the Lien Processing Unit, prepare the certificate and file a new NFTL (emphasis added)

The copies of Certificates of Release of Federal Tax Liens included in Exhibit #s 19 & 20 of the Augmentation of Administrative Record prove that in neither case was Form 12474-A used by the IRS. In each case the form utilized was 12474. Form 12474, provides: "I certify that we mistakenly issued a certificate of release of the Notice of Federal Tax Lien etc"...: whereas Form 12474-A provides: "I certify that we mistakenly allowed a Notice of Federal Tax Lien filed against the taxpayer named below to operate as a Certificate of Release...".

E. Respondent Admits There Were Ex Parte Communications by Appeals Employees

Revenue Procedure 2000-43 prohibits ex parte communications that appear to compromise the Appeals office. Actual influence isn't required, only a reasonable possibility that the prohibited communications may have compromised the Appeals officer's impartiality. See Drake 125 T.C. at 209-20. Petitioner submits that Ms. Chadwell was anything but impartial. This evidence is irrefutable proof that the IRS and its employees **fraudulently attempted to collect uncollectible taxes.**

Also,. in the Internal Revenue Service Collection function (ICS) case history printout dated June 1, 2006, Exhibit 8 of the Stipulation of Facts, the following appears under the action date of

10/18/05:

> SPOKE WITH GM LATE P.M. 10/17/05 REGARDING THE LIEN AND STATUTE ISSUE. **GM STATED THE CERTIFICATE OF RELEASE SHOULD NOT HAVE BEEN ISSUED ON A SELF RELEASING NFTL.** WE REVIEWED THE STATUTE DATES AND THE DATES OF THE BANKRUPTCY AND THE OFFER. GM SUGGESTED THAT I MEET WITH A BANKRUPTCY TECH TO COMPLETE RESEARCH ON PACER REGARDING THE FIRST TC 520/521. R/O IS THEN TO MAIL AC REGARDING THE ISSUE OF THE FIRST 520/521 AND THE EXTENSION OF THE STATUTE PRIOR TO THE TC 150 DATE. GM REQUESTED A FAXED COPY OF THE CERTIFICATE OF RELEASE FOR HER REVIEW. FAXED THE LIEN RELEASE AND THE ESCROW DEMAND ISSUED BY CINCINNATI. (Emphasis added)

At page 44 of the Internal Revenue Service Collection function ICS case history printout dated June 1, 2006, Exhibit 8 of the Stipulation of Facts, the following appears under the action date of 10/18/05:

> I ADVISED TP THAT THE NFTL WILL BE REINSTATED. HE STATED THAT I ENJOYED RUINING HIS LIFE. I STATED THAT WAS NOT TRUE AND ADVISED THE TP OF HIS CAP RIGHTS. HE STATED WHAT GOOD WOULD THAT DO, HE WILL HAVE TO HIRE AN ATTORNEY AT THIS POINT. I ALSO ADVISED THE TP OF HIS CDP RIGHTS AFTER THE LIEN IS FILED. **TP ASKED WHY THE LIENS HAD BEEN RELEASED. I STATED I DID NOT KNOW THE ANSWER. IT COULD HAVE BEEN DUE TO THE REFILE PERIOD OF THE LIEN, WHICH WAS WHEN THE TP WAS IN THE OFFER STATUS. HOWEVER, THE EXPIRATION OF THE REFILE PERIOD WOULD NOT JUSTIFY THE CERTIFICATE OF RELEASE OF LIEN.** (emphasis added)

IRC Section 6330 sets out the process for administrative review or decision by the IRS to levy on taxpayers' property. One of the protections that section gives taxpayers is a promise that the hearing will be conducted by an IRS employee who is impartial. (Sec. 6330(b)(3).) Congress reinforced this requirement by directing the Commissioner to reorganize the IRS so that the entire IRS Appeals function would be independent. (Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. 105-206, sec. 1001(a), 112 Stat. 689.) The Commissioner then made the guarantee of impartiality part of the IRS's standard operating procedure by issuing Revenue Procedure 2000-43, 2000-2C.IB. 404. This procedure prohibits *ex parte* communications by IRS employees that would appear to compromise the independence of an Appeals Officer.

Respondent asserts that there were no improper ex parte communications in this case because "...the **majority** of the communications...were by Revenue Officer Martinez, prior to the date the CDP hearing case was in existence." Respondent then follows with the self-serving statement that "[n]o appeals employee was involved in those communications." (RB at p. 30)

The problem with Respondent's argument is that if the **majority** of the communications were prior to the CDP hearing, then the **minority** of the communications were after the CDP hearing and were in fact improper ex parte communications.

Settlement Officer Chadwick's lack of impartiality is established by her statement: ***"Hopefully the notice of revocation was recorded and mailed to the TP before this date."***

Respondent admits that Appeals employee Chadwell had received ex parte communications, but asserts that they were only about Petitioner's damage suit and the communication "contained no discussion of the strength or weaknesses of Petitioner's case." (RB p. 30).

Respondent's self-serving denials aside, the fact remains that there were ex parte communications regarding Petitioner Are we to believe that the only communications were those accidently jotted down and discovered by Petitioner? I think not.

As just indicated, there is no question that the ex parte communications in this case compromised the independence of the Appeals Officer.

1. Ex Parte Communication: The very first entry by Appeals Officer Chadwell:

   Received case file from screener per litigation advisor in laguna, this TP has a damage suit pending relating to the lien. (Exhibit 5)

2. Ex Parte Communication:

   CDP received on 4/3/06. Assigned to this SO on 5/16/06. **Was notified by Litigation Advisor** in Laguna Niguel that **TP had a**

damage suit pending relating to the lien filing. Also have CDP on related Pship entity with same issues 5/5/06 ICS History Entry by Litigation Advisor shows possible different CSED computation. (emphasis added) (CDP Collection Due Process Hearing) (SO Settlement Officer) (Exhibit 5)

3. Ex Parte Communication:

Memorandum from the Revenue Officer Martinez, to Karen Buhrow, Lien Advisor thru Patricia Medina, Abusive Tax Avoidance Transactions (ATAT) Group Manager 3100 dated November 07, 2005. In that letter Revenue Officer Martinez stated: "The taxpayer owes 1040 income tax for the tax years 1993, 1994, 1995, 1996, 2003 and 2004" (Exhibit 9)

Revenue Procedure 2000-43 prohibits *ex parte* communications that *appear* to compromise the Appeals office. Actual influence isn't required, only a reasonable possibility that the prohibited communications may have compromised the Appeals officer's impartiality. See *Drake*, 125 T.C. at 209-20. Thus, Petitioner should prevail on appeal, preventing the Internal Revenue Service from benefitting from its unethical and illegal conduct.

VII. CONCLUSION

As demonstrated herein, the IRS has acted illegally and unconscionably with regard to this taxpayer. The IRS has engaged in improper *ex parte* communications; it has fraudulently back dated documents to make it appear that the IRS complied with mandatory provision of both the IRC and the IRM, when refiling liens which were previously released both by self releasing and by the issuance and recordation of Certificates of Release of Federal Tax Liens and not subject to refiling in any event.

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Revenue Officer Martinez falsely, fraudulently and maliciously interfered with taxpayer's escrow causing the escrow to failresulting in monetary and emotional damages to taxpayer.

WHEREFORE petitioner requests the taxes for tax years 1993 and 1994 be ordered uncollectible.

Respectfully submitted:

Dated: January 25, 2008

Rod M Toothacre

Rodney M. Toothacre, *pro se*

EXHIBIT B:

Stipulation of Facts

UNITED STATES TAX COURT

RODNEY M. TOOTHACRE,	)	
Petitioner,	)	
v.	)	Docket No. 26357-06"L"
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent.	)	

STIPULATION OF FACTS

It is hereby stipulated that for the purposes of this case, the following statements may be accepted as facts and all exhibits referred to herein and attached hereto may be accepted as authentic and are incorporated in this stipulation and made a part hereof; provided, however, that either party has the right to object to the admission of any such facts and exhibits in evidence on the grounds of materiality and relevancy, and provided, further, that either party may introduce other and further evidence not inconsistent with the facts herein stipulated.

1. Petitioner resided in Poway, California, on the date the petition was filed in this case.

2. Attached hereto and marked as Exhibit 1-J is a copy of the Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330 (hereinafter "Notice of Determination"), for the tax years 1993 and 1994, sent to petitioner on November 22, 2006, upon which this case is based.

3. Attached hereto and marked as Exhibit 2-J is a copy of

Letter 3172(DO) Notice of Federal Tax Lien Filing and Your Right To A Hearing, dated December 7, 2005, for the tax years 1993 and 1994, which was sent to petitioner by respondent.

4. Attached hereto and marked as Exhibit 3-J is a copy of petitioner's Form 12153 Request for a Collection Due Process Hearing (hereinafter "CDP request"), which was received by respondent on December 23, 2005.

5. Attached hereto and marked as Exhibit 4-J is a copy of a letter dated July 17, 2006, sent by Settlement Officer Cynthia Chadwell, of Internal Revenue Service Office of Appeals, San Diego, California, to petitioner in connection with petitioner's CDP request.

6. Attached hereto and marked as Exhibit 5-J is a copy of the Case Activity Records (case notes) maintained by Settlement Officer Chadwell in connection with her consideration of petitioner's CDP request.

7. Attached hereto and marked as Exhibit 6-J is a copy of the Internal Revenue Service TXMODA computer transcript, dated June 1, 2006, for petitioner's income tax account for the tax year 1993. Attached hereto and marked as Exhibit 7-J is a copy of the Internal Revenue Service TXMODA computer transcript, dated June 1, 2006, for petitioner's income tax account for the tax year 1994. These transcripts were reviewed by Settlement Officer Chadwell in connection with petitioner's CDP request.

8. Attached hereto and marked as Exhibit 8-J is a copy of the Internal Revenue Service Collection function ICS case history printout dated June 1, 2006. The ICS case history was maintained by respondent's employees with respect to petitioner's income tax accounts for the tax years 1993, 1994, 1995, and 1996. Attached hereto and marked as Exhibit 9-J is a copy of a memorandum dated November 7, 2005, prepared by IRS Revenue Officer A. Martinez concerning petitioner's income tax accounts for the tax years 1993 and 1994. These documents were reviewed by Settlement Officer Chadwell in connection with petitioner's CDP request.

9. Attached hereto and marked as Exhibit 10-J is a copy of the Internal Revenue Service Certificate of Assessments, Payments, and Other Specified Matters dated June 20, 2006, with respect to petitioner's income tax account for the tax year 1993.

10. Attached hereto and marked as Exhibit 11-J is a copy of the Internal Revenue Service Certificate of Assessments, Payments, and Other Specified Matters dated June 20, 2006, with respect to petitioner's income tax account for the tax year 1994.

11. Attached hereto and marked as Exhibit 12-J is a copy of correspondence dated July 21, 2006, sent by petitioner to Settlement Officer Chadwell.

12. Attached hereto and marked as Exhibit 13-J is a copy of a letter dated August 3, 2006, sent to petitioner by Settlement Officer Chadwell.

13. Attached hereto and marked as Exhibit 14-J is a copy of an Internal Revenue Service IDRS literal transcript for petitioner's 1993 and 1994 tax years, dated August 3, 2006, sent to petitioner by Settlement Officer Chadwell.

14. Attached hereto and marked as Exhibit 15-J is a copy of correspondence dated August 17, 2006, sent by petitioner to Settlement Officer Chadwell. In his correspondence, petitioner enclosed a letter from Victoria Osborn. The letter from Victoria Osborn sets forth petitioner's position with respect to the issues he raised in his CDP hearing request.

15. Attached hereto and marked as Exhibit 16-J is a copy of a fax dated August 22, 2006, sent by petitioner to Settlement Officer Chadwell.

16. Attached hereto and marked as Exhibit 17-J is a copy of a document entitled "Notice of Intent to Sue the United States of America" which petitioner sent to respondent. Petitioner provided a copy of this document to Settlement Officer Chadwell.

17. Exhibits 1-J through 17-J constitute the administrative record of the above-captioned case.

DONALD L. KORB
Chief Counsel
Internal Revenue Service

____
RODNEY M. TOOTHACRE
Petitioner

13742 Indian Peak Trail
Poway, CA 92064-3058
Telephone: (858) 513-0217

Date: _______________________

By: _______________________
KAREN NICHOLSON SOMMERS
General Attorney
Small Business/Self-Employed
Tax Court Bar No. SK0095
701 B St., Suite 901
San Diego, CA 92101
Telephone: (619) 557-6014 x124

Date: _______________________

EXHIBIT B:

Mr. Toothacre's Motion to Supplement the Record

U.S. TAX COURT FILED DEC 13 2007 AS MOTION TO SUPPLEMENT RECORD

320 SD. 81SD

UNITED STATES TAX COURT

RODNEY M. TOOTHACRE,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket No. 26357-06"L"

MOTION BY PETITIONER RODNEY M. TOOTHACRE TO AUGMENT THE ADMINISTRATIVE RECORD

Petitioner, Rodney M.. Toothacre, *in pro se,* does hereby move this Honorable Court for an Order permitting the Augmentation of the Administrative Record by adding to the Administrative Record: Exhibits 18 through 26 attached to the Augmentation to the Administrative Record submitted herewith. Petitioner and the attorney for the IRS have attempted to reach a stipulation concerning this matter and have been unable to reach an agreement. Petitioner has served the attorney for the Internal Revenue Service a copy of this motion as well as a copy of the proposed Augmentation to the Administrative Record.

WHEREFORE, Petitioner prays for an order allowing the augmentation of the Administrative record by permitting the filing of the Augmentation To The Administrative Record.

Respectfully submitted:

RODNEY M. TOOTHACRE
Petitioner

[signature]

13742 Indian Peak Trail
Poway, CA 92064-3058
Telephone: (858) 513-0217

Date: 12/10/07

REC'D SAN DIEGO CHIEF COUNSEL 2008 JAN -7 PM 5:36

UNITED STATES TAX COURT

RODNEY M. TOOTHACRE, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	)	Docket No. 26357-06"L"

AUGMENTATION TO THE ADMINISTRATIVE RECORD

After motion by the Petitioner and approval of the Court the Administrative Record is augmented by adding to the Administrative Record, the following

18. Attached hereto and marked as Exhibit 18 is a six (6) page document, which is a Notice of Intention to Levy On Certain Assets. The notice is dated 07-18-2005.

19. Attached hereto and marked as Exhibit 19 is a Revocation of Certificate of Release of Federal Tax Lien. This document bears no recording information. It appears to be dated December 1, 2005 and signed by Susan A. Hansen, Director, Campus Compliance Operations in Laguna Niguel, California.

20. Attached hereto and marked as Exhibit 20 is a three page document which is a certified copy of a Revocation of Certificate of Release of Federal Tax Lien which appears to be signed on December 1, 2005, by Susan A. Hansen, Director, Campus Compliance in Laguna Niguel, California. This Revocation of Certificate of Release of Federal Tax Lien is very similar to the one which is Exhibit 19, but it is prepared on a different form and it contains recording information. The recording information indicates that it was recorded in the office of the San Diego County Recorder on December 16, 2005.

21. Attached hereto and marked as Exhibit 21 is a three page document purporting to be certified copy of a Notice of Federal Tax Lien. It appears to have been signed by A. Martinez and

indicates that it was prepared in Laguna Niguel on December 2, 2005. The Exhibit bears recording information indicating that it was recorded in the office of the San Diego County Recorder on December 5, 2006 at 8:19 AM.

22. Attached hereto and marked Exhibit 22 is a single page two sided document which is another Notice of Federal Tax Lien on the same parties for the same tax periods. This NFTL appears to have been signed by Susan A. Hansen for A. Martinez, Revenue Officer on December 2, 2005. This Notice of Federal Tax Lien bears recording information indicating it was recorded in the office of the San Diego County Recorder on December 16, 2006.

23. Attached hereto, marked Exhibit 23 are two documents issued by the Manager of The IRS Lien Unit, one dated August 5, 2005, the other dated September 3, 2006. The first is addressed to Fidelity National Title Company c/o Natalie Drosi., the escrow company handling the refinance escrow. The other document (9/3/05) was addressed to Rodney M & Marcia L Toothacre.

24. Attached hereto, marked Exhibit 24 is a Declamation of Jane T. Sciffmann together with a Revocation of Certificate of Release of Federal Tax Lien, a copy of an envelope with the 'franking' date and a copy of the handwriting which is on the original of the envelope.

25. Three notices of Federal Tax Liens purportedly against the Toothacre & Pederson partnership. Two were recorded on December 22, 2005 and the third one was recorded on January 3, 2006.

26. Exhibits 1 through 227 constitute the Augmentation to the Administrative Record of the above-captioned case.

Respectfully submitted:

RODNEY M. TOOTHACRE
Petitioner

Rod M Toothacre
13742 Indian Peak Trail
Poway, CA 92064-3058
Telephone: (858) 513-0217
Date: 12/10/07